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REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS OF KENTUCKY.

VOLUME I.
EDWARD W. HINES, REPORTER.

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CONTAINING CASES FROM MARCH 21, 1885, TO MARCH 11, 1886,
AND ALSO A FEW CASES DECIDED AT SEPTEMBER
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JUDICIAL OFFICERS OF THE STATE.

COURT OF APPEALS OF KENTUCKY.

HON. W. S. PRYOR, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

HON. JOSEPH H. LEWIS,

HON. W. H. HOLT,

*HON. CASWELL BENNETT.

* Elected first Monday in August, 1886, for term of eight years, to succeed Hon. THOS. H. HINES.

OFFICERS OF COURT.

P. W. HARDIN, ATTORNEY GENERAL.

EDWARD W. HINES, REPORTER.

T. J. HENRY, CLERK.

T. G. POORE,
S. M. GAINES, } DEPUTY CLERKS.
R. L. GREENE, }

GEORGE A. ROBERTSON, SERGEANT-AT-ARMS.

JAMES MCAULIFFE, TIPSTAFF,

WILLIAM FRENCH, JANITOR.

JUDGES OF SUPERIOR COURT.

HON. JAMES H. BOWDEN, PRESIDING JUDGE,

HON. J. Q. WARD,

HON. JOSEPH BARBOUR.

JUDGES OF CIRCUIT COURTS.

Elected First Monday in August, 1886, for Term of Six Years.

1st District—	HON. C. T. RANDLE	HICKMAN.
2d District—	HON. J. B. GRACE	CADIZ.
3d District—	HON. M. C. GIVENS	DIXON.
4th District—	HON. L. P. LITTLE	OWENSBORO.
5th District—	HON. W. L. REEVES	ELKTON.
6th District—	HON. T. R. McBEATH	LEITCHFIELD.
7th District—	HON. D. R. CARR	GLASGOW.
8th District—	HON. T. Z. MORROW	SOMERSET.
9th District—	HON. W. L. JACKSON	LOUISVILLE.
10th District—	HON. J. R. MORTON	LEXINGTON.
11th District—	HON. WARREN MONTFORT	NEW LIBERTY.
12th District—	HON. WM. E. ARTHUR	COVINGTON.
13th District—	HON. JOHN E. COOPER	WEST LIBERTY.
14th District—	HON. A. E. COLE	FLEMINGSBURG.
15th District—	HON. ROBERT BOYD	PINE ILLE.
16th District—	HON. JNO. M. BURNS	CATLETTSBURG.
17th District—	HON. S. E. DeHAVEN	LAGRANGE.
18th District—	HON. W. E. RUSSELL	LEBANON.
19th District—	HON. H. O. LILLY	IRVINE.

JUDGES OF COMMON PLEAS COURTS.

For Jefferson County.

HON. EMMET FIELD LOUISVILLE.

For Counties of Fayette, Scott, Woodford, Jessamine, Franklin and Grant..

HON. H. MARSHALL BUFORD LEXINGTON.

For the Counties of Ballard, Hickman, McCracken and Graves.

HON. W. S. BISHOP BLANDVILLE.

For the Counties of Bath, Bourbon, Clark, Madison and Montgomery.

HON. T. J. SCOTT RICHMOND.

JUDGE OF CRIMINAL COURT.

12th District—HON. GEO. G. PERKINS COVINGTON.

LOUISVILLE CHANCERY COURT.

CHANCELLOR—HON. I. W. EDWARDS LOUISVILLE.

JUDGE OF LOUISVILLE LAW AND EQUITY COURT.

HON. STERLING B. TONEY LOUISVILLE.

CHANCERY COURT.

For the Counties of Campbell, Kenton, Bracken and Pendleton.

JUDGE—HON. JOHN W. MENZIES PALMOUTH.

COMMONWEALTH'S ATTORNEYS.

Elected First Monday in August, 1886, for the Term of Six Years,

1st District—S. H. CROSSLAND	MAYFIELD.
2d District—JAMES B. GARNETT	CADIZ.
3d District—J. H. POWELL	HENDERSON.
4th District—J. T. NOE	OWENSBORO.
5th District—N. A. PORTER	BOWLING GREEN.
6th District—C. WATHEN	BRANDENBURG.
7th District—JNO. G. CRADDOCK	BURKSVILLE.
8th District—WM. HERNDON	LANCASTER.
*9th District—A. G. CARUTH	LOUISVILLE.
10th District—C. J. BRONSTON	LEXINGTON.
11th District—J. S. GAUNT	CARROLLTON.
12th District—W. W. CLEARY	COVINGTON.
13th District—M. M. REDWINE	SANDY HOOK.
14th District—J. H. SALLEE	MAYSVILLE.
15th District—S. H. CLARK	PINEVILLE.
16th District—S. G. KINNER	CATLETTSBURG.
17th District—J. S. MORRIS	SHELBYVILLE.
18th District—FINLEY SHUCK	LEBANON.
19th District—JAMES R. MARBS	WHITESBURG.

* Resigned, and AARON KOHN appointed by Judge Jackson, March 1, 1887, to fill the vacancy from the date of appointment until the qualification of his successor, who may be elected the first Monday in August, 1887.

RULES OF THE COURT OF APPEALS.

ADOPTED OCTOBER 10, 1866.

The following were ordered to be recorded as rules of practice of the Court:

1. But two oral arguments on each side will be allowed in any case, and every such argument will be limited to one hour.

2. Where the appellant shall fail to appear on the calling of the cause, either by himself or counsel, or by brief, the appellee shall, on his appearance, either by himself or counsel, or by brief, be entitled to a non-suit, and the Court will, in such case, so order.

3. In every case hereafter entered, *heard* or *submitted*, it shall be the duty of the Clerk to send to the Court, on the same day, the record and papers pertaining to such case.

ADOPTED OCTOBER 20, 1868.

4. Records not made out in a legible handwriting, or not indexed, are to be condemned, and the Clerk making out such record to be prohibited from collecting any thing therefor; and the Clerk of this Court will disregard the expense thereof in taxing costs without any special order in the case.

ADOPTED JULY 7, 1869.

5. The Clerk of this Court shall put no case on the Docket until the Attorneys shall make a memorandum on the record of all the parties, appellants and

Rules.

appellee, and the judgment appealed from, designating the page of the record and the term of the Court at which it was rendered.

ADOPTED MARCH 7, 1870.

6. Hereafter the causes, as set on the Docket, shall have precedence of argument on the day so set, and until they are disposed of, if ready for hearing; but if not, they shall be placed among the passed cases, which shall have precedence in that class of cases according to their number on the Docket; and the agreement of the parties to assign such cases for hearing on a future-named day shall not alter this priority.

ADOPTED NOVEMBER 11, 1878.

7. The Docket for each term of this Court shall be made out and closed twenty days before the commencement thereof; and no case shall be docketed unless the record shall have been filed before the time above fixed for the close of the Docket.

ADOPTED JUNE 29, 1878.

8. When there is no cause for argument, the Court will only be opened on Tuesdays, Thursdays and Saturdays.

9. When two members of the Court desire it, a rehearing shall be granted.

ADOPTED FEBRUARY 10, 1879.

10. When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this Court is made part of a record in another case, and not copied into the transcript, the Attorney for the ap-

Rules.

pellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted.

ADOPTED NOVEMBER 19, 1879.

11. A party intending to move that the Clerk of the inferior Court, or the adverse party, shall be adjudged to pay the costs resulting from a violation by such Clerk or party of subsection 11 of section 737 of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied, and the pages of the transcript where they may be found.

12. If the motion is against the Clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.

ADOPTED MARCH 2, 1881.

13. In cases on the Docket, brief, or a brief statement of points intended to be relied on in argument for appellant, must be filed five days before calling of the cause, and the brief of appellee one day before.

14. COUNSEL ARE REQUESTED TO CITE *at end of BRIEF OR STATEMENT, all authorities RELIED UPON.*

ADOPTED DECEMBER 15, 1882.

15. After a cause shall have been submitted, no brief shall be filed without giving the opposing counsel ten days' written notice of the motion to file, or obtaining the consent of the Court; and whenever a brief shall be filed after submission, the opposing

Rules.

counsel will be allowed ten days thereafter to file an additional brief.

ADOPTED NOVEMBER 27, 1882.

16. If an appellant or his Attorney, or an appellee with a cross-appeal or his Attorney, shall, for any purpose, withdraw the record from the Clerk's custody without the special order of the Court, and fail or neglect to produce it in Court on call of the case for submission or argument, the appeal or cross-appeal, on motion of the adverse party, shall be dismissed for want of proper prosecution.

ADOPTED NOVEMBER 16, 1882.

17. *First.* Appeals from the Superior Court shall stand for trial during the first term, beginning not less than twenty days after the appeal shall have been granted by the Superior Court.

Second. The Clerk shall arrange the appeals from the Superior Court upon the regular Docket of this Court, giving them place in the order granted, at the head of and before other cases from the same Judicial District from which they may be taken.

Third. No summons shall be necessary where all the proper parties were before the Superior Court.

Fourth. In other respects the rules applicable to appeals from the Circuit Court shall govern appeals from the Superior Court, except that no additional or other transcript than that upon which the case was tried in the Superior Court shall be filed or brought up, unless application for that purpose shall have been made to, and improperly refused by, the Superior Court.

Rules.

ADOPTED JANUARY 15, 1884.

18. Ten days' notice of a motion to affirm as a delay case must be given appellant or his attorney, otherwise such motion will not be heard until the case is called for trial on the day it is set on the Docket.

ADOPTED MARCH 15, 1884.

19. Petitions for rehearing must clearly show from the record that some question duly submitted by counsel, and decisive of the case, has been overlooked by the Court, or that the decision is in conflict with a statute, or with a controlling decision to which the attention of the Court was not drawn, through neglect or inadvertence of counsel. Any petition violative of this rule will not be permitted to be filed, and if filed, will be stricken from the record.

ADOPTED JUNE 16, 1887.

20. Ordered, that where time is extended to file a petition for rehearing, and the time expires during vacation, or where the Court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the Clerk in the Clerk's office within the time shall be held sufficient. The Clerk has no right to extend the time for filing, and this can only be done by an order from one of the Judges.

RULES OF THE SUPERIOR COURT.

GENERAL RULES.

I.

No appeal shall be docketed for a term beginning less than twenty days after the filing of the transcript.

II.

Records not made out as required by law will, in proper cases, be condemned, and no fee therefor shall be collected.

III.

1. A party intending to move that the Clerk of the inferior Court, or the adverse party, shall be adjudged to pay the costs resulting from a violation by such Clerk or party of subsection eleven of section seven hundred and thirty-seven of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied, and the pages of the transcript where they may be found.

2. If the motion is against the Clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.

IV.

1. If, on the calling of a cause, the appellant shall fail to appear, either in person or by counsel, or brief,

Rules.

and if the appellee shall appear in person or by counsel, or brief, and shall move to dismiss the appeal for want of prosecution, it will be dismissed.

2. If there is no such appearance by either appellant or appellee, the appeal will be continued the first term and dismissed at the second.

V.

When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this court is made part of a record in another case, and not copied into the transcript, the attorney for the appellant must see that such old record is placed with the new record before the cause is submitted.

VI.

But two oral arguments on each side will be allowed in any case, and every such argument will be limited to one hour.

VII.

1. No cause will be submitted, unless the transcript is then in the Clerk's office.

2. Unless for special reason shown, no brief can be filed after a cause is submitted.

3. Parties will not be permitted to withdraw the transcript from the Clerk's office after submission without leave of Court.

VIII.

1. No motion by an appellee to dismiss an appeal, after the transcript has been filed, will be entertained on any other day than that for which the case is set.

Rules.

unless ten days' notice has been given the appellant or his attorney of record.

2. No motion to affirm as a delay case will be entertained on any other day than that for which the case is set, unless ten days' notice has been given the appellant or his attorney of record. No arguments will be heard on such motions, but parties may file short statements in writing.

IX.

A mandate shall, unless otherwise ordered, issue on the expiration of thirty days, excluding Sundays, from the day on which the decision is rendered.

X.

A petition for rehearing must, unless the time is extended, be filed before the expiration of the time designated in Rule IX.

DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY.

SEPTEMBER TERM, 1884.

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106	259
83	1
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The first six cases in this volume were inadvertently omitted from their proper place in 82 Ky., and are now published out of their regular order.

CASE 1—INDICTMENT—SEPTEMBER 4, 1884.

Commonwealth v. Arnold.

APPEAL FROM GARRARD CIRCUIT COURT.

1. **CRIMINAL LAW—NEW TRIAL—FORMER JEOPARDY.**—Where a new trial is granted to one who has been convicted of manslaughter under an indictment for murder, he is in the same position as if no trial had been had, and may be again tried for murder.
2. **CONSTITUTIONAL LAW—NEW TRIAL.**—The Legislature has the right to prescribe the terms upon which one who has been convicted of crime may have a new trial; therefore section 270 of the Criminal Code, which provides that "the granting of a new trial places the parties in the same position as if no trial had been had," is not unconstitutional.

P. W. HARDIN, ATTORNEY-GENERAL, AND EDWARD W. HINES
FOR APPELLANT.

1. Where the accused has been convicted of manslaughter under an indictment for murder, and a new trial has been granted at his instance and request, the implied acquittal of murder involved in the first verdict is not a bar to another trial of the defendant for that offense under the same indictment. (*State v. Behimer*, 20 Ohio State, 572; *Veatch v. State*, 60 Ind., 291; *Morris v. State*, 1 Blackf., 87; *State v. Commissioners of Cross-roads*, 3 Hill (S. C.), 241; *Bailey v. State*, 26 Ga., 579; *Mitchell v. State*, 8 Yerg., 514.)

Commonwealth v. Arnold.

2. The granting of a new trial places the parties in the same position as if no trial had been had. (Criminal Code, section 270; *State v. Simms*, 71 Mo., 358.)
8. The Legislature has the right to prescribe the terms upon which the accused may have a new trial.

R. C. WARREN, COMMONWEALTH'S ATTORNEY, ON SAME SIDE.

1. The ordering of a new trial leaves the parties in the same position as they were before the first trial.
2. The verdict of a jury is a legal unit, and where there is but one count the verdict can not be set aside in part and sustained in part. (Bishop's Criminal Law, section 1005.)
8. When the defendant applied to the Court of Appeals to vacate the judgment and sentence of manslaughter against him, he waived any objection to being put in jeopardy a second time. (Bishop's Criminal Law, section 998; *McKee v. People*, 32 N. Y., 289; *Cooley's Constitutional Limitations*, pages 327, 328.)

W. O. BRADLEY, W. A. MORROW FOR APPELLEE.

1. Where a new trial is granted to one found guilty of manslaughter under an indictment for murder, he is protected from any further prosecution for the murder. (Bishop's Criminal Law, sections 1004, 1056, 1057; *Breenan v. People*, 15 Ill., 511; *Hunt v. State*, 25 Miss., 378; *Slaughter v. State*, 6 Humph. (Tenn.), 411; *State v. Kemper*, 17 Wis., 699; *State v. Martin*, 30 Wis., 216; *Gee v. Keenan*, 7 Wis., 695; *Leslie v. State*, 18 Ohio State, 390; *Cooley's Constitutional Limitations*, 328; *Campbell v. State*, 9 Yerg., 333; *State v. Kettle*, 2 Tyler, 471; *Morris v. State*, 8 S. & M., 672; *Enson v. State*, 1 Swan., 14; *Guenther v. People*, 24 N. Y., 100; Criminal Code, section 6; *State v. Gleason*, 56 Iowa, 208; *Lippie v. People*, 10 Brader (Ill.), 144; *People v. Dowling*, 86 N. Y., 478; *People v. McDonnell*, 17 Weekly Digest, 19; *State v. Dennison*, 31 La. Ann., 419; *Nutt v. State*, 63 Ala., 180; *Berry v. State*, 65 Ala., 117; *Smith v. State*, 68 Ala., 424.)
2. Section 270 of the Criminal Code was intended to regulate the conduct of a new trial only as to those matters about which a new trial has been sought and granted. (*People v. Gilmore*, 4 Cal., 876.)
8. The Legislature has no power to impose, as a condition of a new trial, that the party shall again place himself in jeopardy as to an offense of which he has been acquitted.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

W. A. Arnold was indicted in the Garrard Circuit Court for the murder of one Robert Boyle, and when tried was convicted of manslaughter. The judgment

of conviction was reversed and a new trial granted. On the second trial the accused filed a plea in bar or former acquittal as to the charge for murder contained in the indictment, maintaining that the conviction for the lesser offense, although the verdict was set aside at his instance, was an acquittal of the greater offense. The court below so held, and the case is brought to this court by the attorney for the State, insisting that an error was committed by the court below to the prejudice of the Commonwealth in overruling the demurrer to the plea.

Section 270 of the Criminal Code provides, that "the granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to in evidence or in argument."

Some of the elementary authorities, sustained by numerous decisions, establish the doctrine that one indicted for murder and found guilty of manslaughter is protected from any further prosecution for murder. (Bishop's Criminal Law, volume 1.) In such a view of the question we can not concur. Under the Criminal Code of this State an indictment for murder, containing but the one charge, embraces all the lesser degrees of the offense, or which may be included under it; and this case may be considered as if there were several counts, charging various degrees of the same offense. The Code of Practice settles this question, unless the provision referred to is unconstitutional.

It is manifest that by the reversal of the judg-

ment. of conviction and the granting of a new trial, there is no verdict or judgment in existence acquitting or convicting the accused of any of the degrees of the offense with which he stands charged. The Legislature has provided the manner in which a new trial may be had and the causes for which it may be granted; and when a conviction is had, and the accused sees proper to ask for a new trial, we see no constitutional objection in requiring him to submit to the conditions imposed by the statute. It is urged that such a ruling compels the accused to submit either to the verdict of manslaughter against him or subject himself to a trial for a greater offense. While this may be true he stands convicted, and is relieved from the verdict of guilty on the condition that he consents to be re-tried on the charge contained in the indictment. There is no injustice or hardship in compelling the accused, when taking advantage of the provisions of the Code in order to obtain a new trial, to submit to the provisions imposing the conditions upon which a re-trial is awarded. If a conviction for manslaughter implies an acquittal of the higher offense, the accused on his own motion has asked the court to set aside the verdict from which this implication of innocence or acquittal of the graver offense arises. The conviction no longer exists, and when set aside it can not be used as evidence or pleaded in bar of the indictment. There is neither verdict nor judgment of guilt as to any degree of the offense.

The accused when placed on trial, the court having jurisdiction of the case and the indictment sufficient

in substance to sustain a conviction, having selected a jury, empaneled and sworn, was entitled to a verdict that would bar any other prosecution. In this case a verdict was rendered, and the accused, not satisfied, has, on his own motion, caused that verdict to be set aside. In such a case the "accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection." (Cooley's Constitutional Limitations, page 401, 5th edition.)

The same author says: "If a prisoner is acquitted on some of the counts in an indictment and convicted on others, and a new trial is obtained on his motion, he can be put upon trial a second time on those only on which he was before convicted." What effect would be given to separate verdicts on each count in one indictment, the record showing an acquittal as to one count, and a motion to grant a new trial as to the count upon which the accused was found guilty, is not necessary to be determined.

A verdict of guilty of manslaughter implies that the jury did not believe the accused guilty of murder; still there is but one homicide committed, and who is the offender and the degree of the homicide has not been ascertained. There is no record showing that the accused committed the offense, or any fact reducing the offense, if committed, from murder to manslaughter. The law presumes the accused innocent until his guilt is shown, and it devolves on the State to show, although the case has once been tried, that the accused committed the offense and the circumstances attending it. There was nothing in

Commonwealth v. Arnold.

the record, after the new trial had been granted, showing that any homicide had been committed; and if there is an implied acquittal of the offense charged in the indictment, why is not the accused entitled to an acquittal for all the lesser degrees? A verdict of acquittal on an indictment for murder is a bar to any prosecution 'or manslaughter, and we perceive no valid reason for holding that the granting of a new trial in this case determined in effect that if the accused did commit the homicide, it was only done in sudden heat and passion. The verdict is an entirety, and we have no doubt as to the power of the Legislature to prescribe for the accused the terms upon which he may have a second hearing. The court below should have sustained the demurrer to the plea. (State v. Behimer, 20 Ohio State, 572; Morris v. State, 1 Blackford, 37; Livingston v. Commonwealth, 14 Grattan, 592.)

In Veach v. The State, 60 Indiana, 291, the statute of that State regulating criminal proceedings contains the same provision with reference to new trials found in our Code of Practice, and it was held, where the accused had been convicted of manslaughter and a new trial granted him, that he might, upon the new trial, be convicted of murder.

Stevenson v. Phoenix Insurance Co.

CASE 2—PETITION ORDINARY—SEPTEMBER 16, 1884.

83 2
93 101

Stevenson v. Phoenix Insurance Co.

APPEAL FROM SCOTT COURT OF COMMON PLEAS.

INSURANCE—BREACH OF CONDITION AS TO OTHER INSURANCE—VOID
AND VOIDABLE POLICIES.

1. Where a policy of fire insurance contains the condition that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured," the policy shall be void, a breach of that condition does not render the policy void, but voidable only, to be treated as void by the insurer at his own exclusive option.
2. Such a condition is broken if the insured subsequently takes out insurance on the same property, even though the policy subsequently issued be void.

W. S. DARNABY FOR APPELLANT.

1. Where a policy of insurance provides that it shall be void if the insured takes out other insurance on the property insured, the taking out of other insurance does not work a forfeiture of the first policy if the second policy, by reason of a provision to that effect, is void because of the prior insurance. The overwhelming weight of authority is to this effect, and the case of *Suggs v. Liverpool, London and Globe Insurance Co.*, MS. Op., March 27, 1880, being in conflict therewith, should be overruled. (*Flanders on Insurance*, 57; *Parson's Mar. Law*, 2d volume, page 100; *May on Insurance*, 489; *Wood on Fire Insurance*, 586; *Lindley v. Union Farmers' Mutual Insurance Co.*, 65 Me., 372; *Philbrook v. N. E. Mut. Fire Ins. Co.*, 3 Me., 137; *Gee v. Cheshire Mut. Fire Ins. Co.*, 55 N. H., 65; *Gale v. The Ins. Co.*, 41 N. H., 170; *Thomas v. Builders' Mut. Fire Ins. Co.*, 119 Mass., 121; *Jackson v. Mass. Ins. Co.*, 23 Pick., 418; *Clark v. New England Ins. Co.*, 6 Cush., 342; *Barrett v. Union Ins. Co.*, 7 Cush., 179; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 62; *Hardy v. Union Ins. Co.*, 4 Allen, 217; *Kimball v. Howard Ins. Co.*, 8 Gray, 83; *Stacey v. Franklin Ins. Co.*, 2 Watts & Sergt., 544; *Mitchell v. Lycoming Mut. Ins. Co.*, 1 P. F. Smith, 409; *Scheck v. Mer. Co. Mutual Ins. Co.*, 4 Zab., 447; *Knight v. Eureka Fire and Marine Ins. Co.*, 26 Ohio St., 664; *Freeman Ins. Co. v. Holt*, Rec'r, Ohio St., March, 1880; *Rising Sun Ins. Co. v. Slaughter, &c.*, 20 Ind., 520; *Overmeyer, &c., v. Globe Mutual Ins. Co.*, 48 Mo., 577; *Hubbard v. The Hartford Ins. Co.*, 33 Iowa, 329; *Sutherland v. Old Dominion Ins. Co.*, 31 Grattan, 176.)

Stevenson v. Phoenix Insurance Co.

JAMES E. CANTRILL, J. F. ASKEW, FOR APPELLEE.

The subsequent insurance taken out by appellant was not void; but if it had been, that fact would not have prevented a forfeiture of the first policy. (*Suggs v. Liverpool, London and Globe Ins. Co.*, MS. Op., March 27, 1880.)

LINCOLN, STEPHENS AND SLATTERY ON SAME SIDE.

1. Although a policy of insurance provides that it shall be void if the insured has any other insurance on the property, the fact that he has other insurance does not render the policy absolutely void; it is only voidable, and the taking out of such a policy works a forfeiture of a former policy on the same property which provides that it shall be void if the insured takes out other insurance. (*Suggs v. The Liverpool and Globe Ins. Co.*, MS. Op., March 27, 1880; *Wood on Insurance*, section 65; *Bigler v. N. Y. Central Ins. Co.*, 20 Barb., 637, and 22 N. Y., 404-406; *Carpenter v. The Providence Wash. Ins. Co.*, 16 Pet., 508; *Wing v. Harvey*, 5 DeGex, McN. & G., 270; *Deposit Life Ass. Co. v. Ayscough*, 6 El. & Bl., 763; *Lackey v. Georgia Ins. Co.*, 42 Ga., 459; *Holbrook v. Hartford Ins. Co.*, 33 Iowa, 329; *David v. Hartford Ins. Co.*, 13 Iowa, 97; *Ramsay Cloth Co. v. M. F. Ins. Co.*, 11 Up. Can. Q. B., 522; *Dafoe v. Ins. Co.*, 7 Up. Can. C. P., 58; *Hatton v. Beacon Ins. Co.*, 16 Up. Can. Q. B., 317; *Jacobs v. Eq. Ins. Co.*, 19 Up. Can. R., 253; *Duclos, &c., v. Citizens' Ins. Co.*, 23 La. Ann., 333; *Landers v. Nat. Fire Ins. Co.*, 25 Reporter, 792.)
2. In addition to the cases directly sustaining the case of *Suggs v. The Liverpool and Globe Ins. Co.*, MS. Op., March 27, 1880, there are many analogous cases. (*Taylor's Landlord and Tenant*, section 493; *Stuyvesant v. Davis*, 9 Paige, 431; *Clark v. Jones*, 1 Denio, 518; *Armstrong v. Tarquand*, 9 Ir., C. L. R., 50; *Doe dem Bryan v. Banks*, 4 Barn. & Ald., 408; *Arnsby v. Woodward*, 6 Barn. & Cress., 523; *Malins v. Freeman*, 4 Bing., N. C., 398; *McLacklan on Merchant Shipping*, 320; *Hyde v. Watts*, 12 M. & W., 268; *Arnold v. Richmond Iron Works*, 1 Gray, 437; *Tucker v. Moreland*, 10 Pet., 69, 73; *Jackson v. Gumaer*, 2 Cow., 552.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellant to recover of appellee \$3,000, amount of a policy of insurance issued October 25, 1877, for one year, on a dwelling-house destroyed by fire.

In the policy is contained the following condition:
 "If the assured shall have, or shall hereafter make

any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * then in every such case this policy shall be void."

In defense of the action it was alleged that on the same day, but after the policy was issued, the plaintiff, in violation of that condition, without the consent of the defendant written on the policy, procured from two other companies policies of insurance on the same property, aggregating \$6,000, to continue in force during the same period.

In reply, it was admitted that the plaintiff did procure other insurance on the property without the defendant's consent as alleged in the answer, but it was stated that the defendant had notice thereof, and waived its right and was estopped to claim a forfeiture of the policy.

Upon the issue as to waiver made by the pleadings a verdict in favor of the plaintiff in the action for the amount sued for was rendered, and judgment entered accordingly; but upon appeal to this court the judgment of the lower court was reversed and cause remanded for a new trial, it being held in the opinion rendered that there was no evidence offered which was proper to go to the jury on the question as to waiver of the forfeiture, and that the motion for nonsuit should have been sustained. (*Phoenix Ins. Co. v. Stevenson*, 78 Ky., 150.)

Upon the return of the case the plaintiff in the action was permitted by the court to file two amended replies, in which it was, in substance, alleged that in each of the two policies procured by him after the

one issued by the defendant was contained a like condition as to previous and subsequent insurance of the same property by other companies; that those policies were issued to him without any notice to, or knowledge on the part of, either of the two companies issuing them of the prior insurance by the defendant until after the house insured was destroyed by fire; and that the two policies being thus rendered invalid by the plaintiff's breach of condition contained in them, there was in fact no violation by him of the condition contained in the policy sued on.

The case is now before this court upon appeal from the judgment sustaining a general demurrer to the amended replies and dismissing the petition.

The question presented by the amended replies has heretofore been passed upon by this court in the case of *Suggs v. Liverpool, London and Globe Ins. Co.*, MS. Opinion, March 27, 1880.

In that case the court, in rendering the opinion, used this language: "Appellant contends that the last insurance was absolutely void, and left the first in full force. He is wrong in any aspect of the case. First, the second insurance was not void, but voidable only at the option of the insurer; and second, if it were void, *ab initio*, that fact would not relieve appellant from the forfeiture resulting from a violation of the stipulations in the first policy against additional insurance."

It is thus obvious that if the opinion in that case is to be adhered to, the judgment in this case sustaining the demurrer to the amended replies must be affirmed.

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Counsel for appellant refers us to several authorities holding a doctrine opposite to that announced in the opinion referred to by this court, and perhaps the weight of authority in this country may sustain him. But, on the other hand, the decision of this court is supported not only by the Supreme Court of the United States and several State courts, but by principle and reason.

In the case of *Baer v. The Phoenix Ins. Co.*, 4 Bush, 242, where the question arose as to the proper construction to be given to a similar condition contained in a policy of fire insurance, this court said: "The object of that condition was to assure the underwriter against over-insurance, or insurance equivalent to the entire risk, whereby the insured, relieved of all risk, might be tempted to procure the loss or to take no care to prevent it. To make it the interest of the insured as well as the insurer to avert loss, no prudent underwriter ever insures for the full value of the property, but leaves the owner so far interested in preventing the loss as to assure his fidelity and vigilance in proper care to avert it."

This precaution on the part of insurance companies is not only justifiable, but indispensable to their success, if not existence. For without such provision against cumulative insurance, fraud and bad faith on the part of the insured would be encouraged, and the legitimate and useful purposes of fire and marine insurance to a great extent defeated.

A contract of insurance, like any other which the law sanctions, should be enforced by the courts according to its terms and conditions. In this case a

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plain and vital stipulation, which the insurer had the right to insert in the policy, and which the assured understanding, or having the opportunity to understand, agreed to, has been deliberately violated by the latter. And he now asks to avoid the forfeiture which results from such violation and is now claimed by the insurer, upon the ground that the two subsequent policies being rendered invalid by like breach of contract and of faith on his part, the first one is now valid and enforceable by either party to it.

But it has been held by this court in the two cases of *Baer v. The Phoenix Ins. Co.* and *Sugg v. Liverpool, London and Globe Ins. Co.*, that a violation by the assured of such a condition in a policy of insurance does not render the policy absolutely void, but simply voidable, to be treated as void by the insurer at his own exclusive option.

The correctness of this ruling is, in our opinion, so manifest that it is needless to enter into an extended discussion to support it; for to hold a contract of insurance that has been violated by only one of the parties to it void, or, in the language of the pleadings, invalid, as to both, is to put it in the power of either party, after making the contract, to render it a nullity by simply violating some one of its conditions.

The two policies referred to in the replies, which were obtained subsequent to that issued by appellee, should not, therefore, be held as void or invalid, but only voidable at the option of the companies issuing them. How they have been treated by the parties the record of this case does not show, nor is it mate-

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rial; for they were procured by appellant, either with the intention to defraud appellee, or in ignorance of the fact that, in obtaining them, he was violating his first contract and incurring a forfeiture of his first policy. And in either case we are forced to conclude he intended to avail himself of cumulative insurance upon his property, and, therefore, was exposed to the temptation to bring about the loss of his property, or at least was rendered less careful to prevent its destruction.

The object of the condition mentioned was thus defeated by the conduct of appellant, and the risk of appellee increased without its knowledge or consent.

When a contract is plain, unambiguous and fair, not vitiated by fraud nor mistake in its execution, the courts are not authorized to make for the parties to it a different one, or to construe it contrary to its express terms, especially when the consequence may be to enable one of the parties to profit by his wrongful violation of it.

The judgment is affirmed.

CASE 8—PETITION EQUITY—SEPTEMBER 23, 1884.**Bagby v. Champ, &c.****APPEAL FROM KENTON CHANCERY COURT.**

CONSTITUTIONAL LAW—ALTERATION OF REMEDY—RIGHT OF MARRIED WOMAN TO VACATE JUDGMENT.—The right to a particular remedy is not a vested right, and the remedy may be altered at the will of the Legislature, provided the alteration does not impair the obligation of the contract.

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The power existing in courts under the Code of 1854 to vacate or modify their judgments after the expiration of the term at which they were rendered, upon the sole ground that the defendant against whom the erroneous proceedings were had was a married woman, has been taken away by the present Code, which applies as well to judgments rendered while the Code of 1854 was in force as to those rendered since, and is valid in its application thereto.

O'HARA AND BRYAN FOR APPELLANT.

1. As the fact that appellant was a married woman did not appear in the record in which judgment was rendered against her, and the error to her prejudice for that reason does not appear upon the record, she is entitled to have the judgment vacated under the provisions of the Code in force at the time the judgment was rendered.
2. The certificate of acknowledgment to a deed is not such part of the record as to show that the party defendant who was certified to have acknowledged it as a married woman, was in fact such. (*Adams v. Jett*, 6 Bush, 585.)
3. A married woman's deed, unless executed according to the statute and proved by the record, is void. (*Prewitt v. Graves, &c.*, 6 J. J. Mar., 119; *Barnett v. Shackelford*, 6 J. J. Mar., 533; *Applegate v. Gray*, 9 Dana, 217.)
4. Appellant having the right under the statute in force at the time judgment was rendered against her to maintain an action to have it vacated, the Legislature had no power to take from her that right. (*Berry & Johnson v. Ransdell*, 4 Met., 264; *Lewis v. Harbin, &c.* 7 B. Mon., 168; 5 B. Mon., 564.)

J. M. COLLINS FOR APPELLEES.

Brief not in record.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1866 J. J. Bagby, appellant, Nancy Bagby, his wife, and J. W. Bagby executed their promissory note to appellee Champ, and to secure its payment a tract of land, many years before that time conveyed by the father of appellant to her and her husband, was mortgaged.

An action in equity was instituted by appellee Champ to recover judgment on the note, and to subject the land mortgaged to satisfy it. And in May,

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1872, the court, where the action was pending, rendered personal judgment for the amount of the note against J. J. and J. W. Bagby, and also judgment for a sale of the land; and in September, 1872, it was sold in pursuance of the judgment, appellee Champ becoming the purchaser and receiving a commissioner's deed therefor.

This action was instituted by appellant, January, 1879, for the purpose of vacating the judgment rendered in favor of appellee Champ in 1872, canceling the mortgage mentioned, and recovering the land purchased by him under that judgment.

A general and special demurrer was filed and sustained by the court below to the petition and amended petition, and orders made overruling the several motions to file the second, third and fourth amended petitions.

It appears from the pleadings filed by appellant that at the date of the judgment of 1872, for the sale of the land, she was a married woman, but subsequently became, and was when this action was commenced, discreet by reason of divorce from her husband.

It is alleged in the pleadings filed in this case by appellant that there existed valid defenses to the action of Champ against J. J. Bagby, John W. Bagby and herself, which she sets out, but that J. J. Bagby, who was then her husband, refused, and she, by reason of being a married woman, could not present them. But it is not necessary to consider any of the reasons for vacating or modifying the judgment of 1872, relied on by her, unless she has the

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right to maintain this action. The first and controlling question, therefore, is, whether she can do so upon the sole ground that when the judgment was rendered she was under the disability of coverture, for no other cause is set forth in her pleadings.

By section 579, Civil Code of 1854, it is provided that the court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order for any of the causes there enumerated, the causes mentioned in subsection 5 being as follows: "For erroneous proceedings against an infant, *married woman*, or person of unsound mind when the condition of such defendant does not appear in the record nor the error in the proceedings."

There can be no question as to the right of appellant to maintain this action under the Civil Code as it stood at the date of the judgment, all the other conditions therein mentioned existing and being complied with by her. But subsection 5, section 518, of the present Code, which went into operation before this action was commenced, is essentially different from the corresponding subsection of the Code of 1854 just quoted. It is as follows: "For erroneous proceedings against a person under disability, *except coverture*, if the condition of such defendant do not appear in the record nor the error in the proceedings."

It thus clearly appears that the power existing under the Code of 1854 of courts in which judgments have been rendered to vacate or modify them after the expiration of the term, upon the ground that the defendant against whom the erroneous pro-

ceedings were had was a married woman, has been taken away by the present Code, and now a defendant who may labor under the disability of coverture is limited to the same remedies under section 518 that persons not under disability are.

It therefore follows, that unless subsection 5 of section 518 is to be held invalid in its application to this case, that the action can not be maintained by appellant.

It is laid down and approved by this court, that the right to a particular remedy is not a vested right. As a general rule, every State has complete control over the remedies which it offers to suitors in its courts. (*McArthur v. Goddin, &c.*, 12 Bush, 274.)

“Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract, and it does not impair it, provided it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made.” (*Cooley’s Constitutional Limitations*, 4 ed., 350.)

In this case the change made in the law, as it existed at the date of the judgment in 1872 and until 1877, affects the remedy merely, and does not at all impair the obligation of a contract in the meaning of Constitution, nor take from appellant a vested right.

By subsection 5, section 579, of the Code of 1854, an exceptional remedy for vacating or modifying judgments was given to persons laboring under disabilities, which were withheld from all others. The

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effect of the corresponding subsection of the present Code has been simply, after five years from the date of that judgment, to take from appellant the right to maintain an action to vacate or modify the judgment, upon the sole ground that she was, when it was rendered, a married woman. But for any other cause enumerated in section 579 she may still maintain the action to vacate or modify, and her right to appeal is left undisturbed. In our opinion, subsection 5, section 518, of the present Code, is valid in its application and governs this case, and, consequently, appellant can not, for the cause set out in her petition and amended petitions, maintain the action.

The judgment is affirmed.

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CASE 4—MOTION—NOVEMBER 20, 1884.

Parrish, &c., v. Ferguson, &c.

Apperson, &c., v. Mitchell, &c.

Berry's Adm'r v. Harris, &c.

1. **APPEALS—TAXATION OF COST.**—Where the clerk of the Court of Appeals has allowed a party, or his counsel, to use the original transcript in a case under an agreement to pay therefor, as if a copy had been actually made, and the party thus using the record is successful, he is entitled to have the cost of a copy taxed as a part of his cost against the unsuccessful party.
2. **REPEAL OF STATUTES.**—Where the General Statutes treat of any subject under a separate title, they must be regarded as containing all the statute law on the subject, and as repealing any previous statutory provision upon the subject omitted therefrom.

Parrish, &c., v. Ferguson, &c. Apperson, &c., v. Mitchell, &c.

McCHORD & HARRISON FOR PLAINTIFFS IN MOTION.

1. The right to charge fees for official services is to be determined by our statutes alone, and there is no statute in this State authorizing a clerk to charge for a copy never in fact made. (General Statutes, chapter 41, section 1; *Ibid.*, chapter 26, section 32.)
2. A promise to pay an officer an extra sum for the performance of official duty is illegal and void.

CORNELISON AND MITCHELL ON SAME SIDE.

An execution may be quashed upon motion, for an error of the clerk in taxing too much cost. (*Noe and Lawless v. Conyers*, 6 J. J. Mar., 514; *McCann v. Gouge*, 9 B. M., 56; *Davie v. Long's Adm'r*, 4 Bush, 575.)

W. H. JULIAN, OF COUNSEL, ON SAME SIDE.

W. LINDSAY FOR DEFENDANTS IN MOTION.

If an execution follows the judgment and taxation of costs, it can not be quashed. The remedy is, first to correct the misprision of the clerk, by rule or motion, for the revision and correction of the taxation; that being done, the court may recall the execution issued upon the erroneous taxation and direct a new execution to be issued upon the corrected taxation. (*Walton v. Brashears*, 4 Bibb, 18.)

A. DUVAL, H. L. STONE, OF COUNSEL, ON SAME SIDE.

CHIEF JUSTICE HINES DELIVERED THE OPINION OF THE COURT.

This is a motion to quash an execution in favor of the clerk, issued from the clerk's office of this court, upon the ground that it embraces a charge for copying a record which was not in fact copied. It appears that counsel for the party who was successful in this court obtained permission from the clerk to use the original record, instead of having a copy, upon the agreement that his client should be charged with a copy, as if in fact made. The charge was so made against the party obtaining the record, and on final judgment his cost in this court, including a copy of the record, was taxed against the unsuccessful party.

Parrish, &c., v. Ferguson, &c. Apperson, &c., v. Mitchell, &c.

Prior to 1856 it was the well settled practice in this court to allow such charges, although the letter of the law authorized a charge for a copy only. On the 3d of March, 1856, the Legislature passed an act forbidding a charge for copy of a record unless actually made, and prescribing a penalty against the clerk for permitting a record to go out of his office, except in cases provided by law. (1 Stanton's Revised Statutes, volume 1, page 535.) The General Statutes, adopted December, 1873, omitted both provisions of the act of 1856, and provided, under the general head of clerks' fees (chapter 41, pages 459-60), for the fees of the clerk of this court. The omission to embrace the provisions of the act of 1856 in the General Statutes, under the authority of *Broadus v. Broadus*, 10 Bush, 299, repealed the act of 1856, requiring a copy of a record to be in fact made, and forbidding the clerk to allow a record to go out of his office except in cases provided by law. That the intention to repeal this law existed in the adoption of the General Statutes is strengthened by the provision therein, that "no clerk of an *inferior* court shall permit the records or papers of his office to be removed, or taken out of the county in which his office is kept, except in cases of invasion or insurrection or in obedience to a summons." (General Statutes, article 1, section 6, chapter 16.) This provision is not found in the Revised Statutes, and its enactment in the General Statutes, together with the omission to re-enact or continue in force the act of 1856, makes it clear that the intention was not only to repeal the act of 1856, but to recognize the former well-known custom or

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practice in this court of charging a party using a record for a copy as if in fact made.

Since the adoption of the General Statutes, the practice existing prior to the act of 1856, of allowing the clerk to charge the party using a record with a copy as if actually made, has been resumed and uniformly followed. It has, in fact, been repeatedly and expressly recognized by this court in overruling motions to quash executions for such costs recovered by the successful against the unsuccessful party. Under these rulings the litigants in this court and the clerks have acted, until such rulings have acquired the sanctity of judicial findings to such an extent that we do not feel justified in overturning them. The unsuccessful party has no cause of complaint. The party using the record is charged as if a copy had been made for him; the charge is not made against the party complaining, and he is in no worse attitude than he would have been if the copy had been actually made. (General Statutes, section 32, chapter 26; chapter 41, page 460.)

Motion overruled.

JUDGE HOLT not sitting.

CASE 5—PETITION ORDINARY—NOVEMBER 22, 1884.

Witty v. C., O. & S. W. R. R. Co.

APPEAL FROM OHIO CIRCUIT COURT.

1. A SEPARATE-GENERAL VERDICT was intended to apply in cases where there is more than one issue, and is a finding for the plaintiff or defendant upon a particular issue.

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2. A SPECIAL VERDICT is a finding of facts, without reference to their relation to any issue.
3. IF A GENERAL VERDICT IS ASKED, the court *must* grant it, and require the jury to return also a general verdict.
4. IF A SPECIAL VERDICT IS ASKED, the court *must* grant it, and *may* in its discretion, also direct a general verdict, but is not compelled to do so as in the case of a separate-general verdict; if, however, the court does direct a general verdict, it must instruct the jury as to the whole law of the case. (But see Acts 1886, volume 1, page 120.)
5. IN DIRECTING A SPECIAL VERDICT the court should confine the questions propounded to the controlling facts in the case, and they should be such as to enable the court, on the return of the verdict, to apply the law and enter judgment without any thing further from the jury; and where either party may be entitled to recover money, or where damages are to be assessed, the court should direct the jury to assess the amount of recovery.
6. NEGLIGENCE IS A QUESTION OF LAW.—In this action, for willful and gross neglect, in which the court directed only a special verdict, the failure of the court to instruct the jury as to what is ordinary and what is willful or gross neglect, was not an error, because when all the facts are found by the jury this is a question of law properly reserved by the court under section 317 of the Code.

JOHN W. McPHERSON, JOE MCCARROLL FOR APPELLANT.

1. The lower court erred in ordering a special verdict *only*. It is a right inherent in juries, when questions of fact are to be tried by them, to review all the facts and find for plaintiff or defendant, according to the right. (Civil Code, section 327.)
2. The court abused its discretion in propounding unnecessary and irrelevant questions. In directing special verdicts the court should shape the questions so as to meet the issues in a plain way. (Berry v. Pusey, 80 Ky., 169.)
3. The court should, in connection with the questions propounded, have instructed the jury as to what was meant by "gross" and "ordinary" negligence. (Berry v. Pusey, 80 Ky., 169; Sullivan's Adm'r v. Bridge Co., 9 Bush, 90; P. & E. R. R. Co. v. Letcher, 5 Ky. Law Rep., 153, 252.)
4. The plaintiff was entitled to judgment for \$5,000 upon the special verdict.
- a. The absence of slight care in the management of railroad trains is gross negligence. (M. & L. R. R. Co. v. Herrick, 13 Bush, 127.)
- b. Where the plaintiff's injury was caused by the gross negligence of the defendant, the question of contributory negligence is not to be considered. (Claxton's Adm'r v. L. & B. S. R. R. Co., 13 Bush, 642; Hoehl's Case, 12 Bush, 49.)
- c. If the immediate negligence is that of an agent or servant, and a co-

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servant is injured thereby, the master is liable, the same as if the injury had been sustained by a stranger. (Booth v. R. R. Co., 29 Am. Rep., 99.)

- d. If the facts are clearly ascertained, the question of negligence growing out of them is exclusively for the court to determine. (L. & P. Canal Co. v. Murphy's Adm'r, 9 Bush, 529; Chiles v. Drake, 2 Met., 147; Lewis v. B. & O. R. R. Co., volume 13 (N. S.), page 286.)
- e. Though the plaintiff was negligent, yet the railroad company is responsible if it appear that its agent could have prevented the accident by the use of ordinary prudence and care in giving reasonable and usual signals of the train's approach. (B. & O. R. R. Co. v. Dougherty, &c., 12 Am. Law Reg. (N. S.), 259; P. & M. R. R. Co. v. Hoehl, 12 Bush, 46; L. C. & L. R. R. Co. v. Goetz's Adm'r, 79 Ky., 447; 12 Bush, 45; 13 Bush, 389, 642; 80 Ky., 144; Wharton on Negligence, sections 828, 835, 388.)
- f. In the use and control of the engine, the engineer is the chief and governing agent of the corporation; the brakeman is, therefore, not in the same common service with the engineer, and ordinary neglect by the latter, resulting in injury to the former, is sufficient to hold the company liable. (L. & N. R. R. Co. v. Collins, 2 Duvall, 117; Caven's Case, 9 Bush, 561.)
- g. If a servant is injured by the unfitness, incompetence or want of skill of a fellow-servant, and the master had knowledge or the means of knowledge of such unfitness, etc., he is responsible for the damage. (49 N. Y., 521; 2 Thompson on Negligence, 932, 974; R. R. Co. v. Thomas' Adm'r, 79 Ky., 170; Wood on Master and Servant, section 416.) Nor can the company excuse itself upon the ground that it was impracticable to obtain a competent servant. (Lou. City Railway v. Weams, 80 Ky., 422.)

EDWARD W. HINES ON SAME SIDE IN PETITION FOR REHEARING.

1. The failure of the engineer to give any signal of the backward movement of his section of the train was gross negligence, when tested by this court's latest definition of that grade of negligence. (L. & N. R. R. Co. v. McCoy, 5 Ky. Law Rep., 404.)
2. It is only when all the essential facts are *admitted* or established by *uncontradicted evidence* that the question of negligence becomes one of pure law for the court. So many things go to make up negligence that it is almost impossible for the court to submit such questions as will elicit *all* the facts, and, therefore, the court should have instructed the jury as to negligence. (Dolfinger v. Fishback, 12 Bush, 478; P. & E. R. R. Co. v. Letcher, 5 Ky. Law Rep., 156.)

HOLMES CUMMINS FOR APPELLEE.

1. The court did not err in directing a special verdict only. (Civil Code, section 327; Berry v. Pusey, 80 Ky., 169; Railway Co. v. Weams, 80 Ky., 422; R. R. Co. v. Letcher, 5 Ky. Law Rep., 153.)

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2. When special verdicts are required questions of law may be reserved, and general instructions need not be given. (Subsection 5 of section 317, Civil Code.)
3. The distinctions in grades of negligence are simply questions of law. (*Dolfinger v. Fishback*, 12 Bush, 478; *Canal Co. v. Murphy*, 9 Bush, 533.)
4. Upon the special findings the court was bound to render judgment for defendant.

CHIEF JUSTICE HINES DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for an injury received by appellant through the alleged willful and gross negligence of appellee while appellant was in its employ as brakeman. Appellee denied any kind of negligence, and pleaded contributory negligence on the part of appellant. On application of appellee, the jury were required to answer certain questions, in the nature of a special verdict, and at the same time appellant also propounded numerous questions which were answered by the jury; but the court, on the application of appellant, refused to instruct the jury to find a general verdict, and neglected to define to the jury the meaning of willful or gross negligence.

The facts testified to by appellant are, that he was breaking on a freight train of appellee near McHenry mines, when the train was divided into two sections, and appellant directed by the conductor, who remained with the rear section, to go with the front section, to which the engine was attached, down to the switch at McHenry mines, and throw the switch so the rear section might follow and be run on to the side-track, and that, when he had so thrown the switch, to cause two whistles to be sounded, and that the conductor would then bring down the rear section

and run it on to the switch. Appellant testifies that, as directed by the conductor, the engineer, the fireman and himself went down the main track past the switch, stopped the engine, opened the switch, and had two whistles sounded for the conductor to bring down the rear section. That after waiting some fifteen or twenty minutes, and seeing and hearing nothing of the rear section, he walked around a curve in the road to ascertain the cause of the conductor's delay, and saw that his cars were "stuck." He then returned, without direction from the conductor or any one, closed the switch, informed the engineer that the rear section was "stuck," and requested him to back up, and assisted in moving the rear section; that, in obedience to this direction, the engineer backed his train, and in going around the curve a collision occurred between the two sections, both at the time moving from opposite directions, and appellant, being on next to the rear car of the front section, was injured. Appellant also testifies that, in so backing a train, the rules of the road required that three whistles should be sounded and this was not done; but there is other evidence tending to show that the signal was given. There was also evidence tending to show that the car that was wrecked, and which resulted in the injury to appellant, was decayed and insecure. This is enough of the evidence to illustrate the questions of law presented.

The principal complaint of appellant is, that the court refused to direct a general verdict in addition to the special findings; that the court erred in not defining to the jury the difference between ordinary

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and willful or gross neglect, and that the directions for special, separate findings were so numerous and involved as to be misleading to the jury.

To the first inquiry presented to the jury at the request of appellant they found that appellant was damaged by the collision in the sum of \$5,000. The second was as follows: "If you say he was damaged, was the injury the result of plaintiff's own negligence or the negligence of the defendant?"

Answer. "Plaintiff's own negligence."

The 5th is: "If you find that the engineer was negligent in not giving the proper signal of his movements at the time of the alleged injury, then you will say so, and also whether said negligence was gross or only ordinary?"

Answer. "Ordinary."

The seventh requires the jury to say whether, at the time of or before the collision, the engineer and conductor, by ordinary care, could have prevented the injury.

Answer. "At the time they could not."

The eighth requires the jury to say whether, if the car wrecked was defective, "it could have been discovered by the close scrutiny and inspection of skillful and competent inspectors." The jury answer: "We think not."

On the request of appellee, the jury found that the engine was signaled to move back by appellant, and that he gave the signal of his own accord, without any direction from the conductor or any one else. The 6th inquiry for appellee was: "Would said accident in which plaintiff was injured have occurred if

the plaintiff had not given such signals to said engineer?"

Answer. "No."

The 14th inquiry is: "Did the employes of the defendant, other than plaintiff, upon said two parts of said train while said sections were approaching each other, and as soon as they knew there was danger of a collision thereof, or as soon as they reasonably might have known it, make the proper effort to stop said car and prevent such collision?"

Answer. "Yes."

A consideration of the questions raised by counsel involves the necessity of construing sections 317, 326, 327, 328 and 329 of the Civil Code.

Subsection 5 of section 317 is: "Either party may require the court to direct the jury to find a separate-general verdict with the general verdict, or to find a special verdict. If a special verdict be so required, the questions of law may be reserved by the court until after verdict; but if a general verdict be required, either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury."

Subsections 1, 2, and 3 of section 326 defines the meaning of the different verdicts that may be returned under the Code.

Subsection 1. "A general verdict is that by which the jury pronounces generally upon all the issues, for the plaintiff or for the defendant.

Subsection 2. "A separate-general verdict is the

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finding, upon any of the issues, in favor of the plaintiff or the defendant."

Subsection 3. "A special verdict is the finding of facts by a jury, as shown in their answers to questions submitted to them in writing."

Section 327 of the Code is: "Unless otherwise directed, the jury may find a general, or a general and separate-general verdict; or a special verdict, with or without a general, or a separate-general verdict; but the court may, without motion, or, upon the motion of a party, shall, direct the jury to find—

"*First.* A separate-general verdict as to any issue, and with such finding the jury shall also return a general verdict; and, if the separate-general verdict be inconsistent with the general verdict, judgment shall be rendered pursuant to the former; or,

"*Second.* A special verdict; and, on such finding, the jury shall return a special verdict only; and the court shall render judgment upon it."

Section 328 is: If a general and a special verdict be inconsistent, judgment shall be rendered pursuant to the latter."

Section 329 is: If, by a general verdict, either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery."

The first inquiry is as to what is meant by a "separate-general verdict." So far as we are informed, there is no such provision, that has been judicially construed, in any of the American codes of civil procedure. It is not found in our Code of 1854, which was superseded by the present Code herein quoted,

and which went into effect January 1, 1877. This expression is defined as a finding "upon any of the *issues* in favor of the plaintiff or the defendant," while a special verdict is defined as "the finding of *facts* by a jury." The distinctive characteristic between the two seems to be, that in the one case the jury pass upon *an issue* made by the pleadings that may be constituted of many facts, and in the other they pass upon the existence of *facts* without reference to their relation to any issue.

The meaning of the expression "separate-general verdict" is, that the verdict is *separate* as to the particular *issue* as distinguished from any other issue in the case, and *general* as to the particular issue. That is, it was intended to apply in cases where there is more than one issue. For instance, an action upon an alleged contract when the issues presented are—first, was the contract procured by fraud or duress? and second, if it was so procured, and, therefore, voidable, was it subsequently ratified by the defendant after a full knowledge of the fraud and the removal of the duress? If, in such case, the jury should find a general verdict for the defendant, the court could not determine whether it was based upon the ground that the evidence authorized the conclusion that there was fraud or duress sufficient to invalidate the contract, or upon the ground that there was not evidence requisite to establish a ratification. The evidence might preponderate in favor of the conclusion that there was fraud or duress sufficient to invalidate the contract, but at the same time the evidence upon the issue of

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ratification might be such that the preponderance in favor of a ratification would be so overwhelming that the court should grant a new trial.

The propriety and usefulness of this provision of the Code as to separate-general verdicts may be better illustrated by a case where the issues are—first, whether the defendant was an infant when he purchased goods from the plaintiff; second, whether, if he was then an infant, he ratified the contract after he become of age; and third, whether, though he was an infant when he purchased the goods, they were suitable to his financial condition and to his station.

In such a case a general verdict for the plaintiff would leave it uncertain, whether the jury went upon the ground that the defendant was of age when he purchased the goods, or upon the ground that he ratified the contract after coming of age, or upon the ground that the goods were necessities; and, consequently, the court could not grant a new trial, if there were evidence conducing to sustain the plaintiff's allegations as to any one of the issues; though there may have been a preponderance of evidence against him upon that issue, and though he may have failed to sustain his allegations upon the other issues. This is the instance given by the editors of the Code of the evil probably intended to be provided against by the adoption of this section. If a separate-general verdict is asked for, the court *shall* grant it, and with it *shall* require the jury to return a general verdict. In such cases it is not only proper but necessary that the jury should be instructed by the court as to the law

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applicable to the particular issues to be found by the jury as fully as if there was only one issue in the case, and the jury were required to find a general verdict thereon. But when a special verdict is demanded, the court "shall" grant it, and *may* reserve the questions of law until after the special verdicts are returned. The court, in its discretion, *may* also direct a general verdict, but it is not compelled to do so as in the case of a separate-general verdict; if, however, the court does direct a general verdict, it shall instruct the jury as to the whole law of the case. Under the Code of 1854, the court was not compelled to grant the request for special verdict. (See section 347; Louisville & N. R. R. Co. v. Case's Adm'r., 9 Bush, 735.) In directing special verdicts, the court should confine them to the controlling facts in the case, and they should be such as to enable the court on the return of the verdicts to apply the law and enter judgment without any thing further from the jury; and where either party may be entitled to recover money, or where damages are to be assessed, the court should direct the jury, as was done in this case, to assess the amount of recovery. In this case the jury found the essential and controlling facts necessary to an intelligent application of the law by the court, and the facts so found by the jury were of such a nature that the court would have been compelled to enter judgment for the defendant, even if there had been a general verdict for the plaintiff.

The complaint by counsel for appellant, that the requests for special verdicts were more numerous than the case required, is well founded; but they are neither so numerous or irrelevant as to have

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misled the jury. The answers returned are manifestly the result of an intelligent comprehension by the jury of all the requests submitted by the court.

The failure of the court to instruct the jury as to what is ordinary and what is willful or gross neglect was not error, because when all the facts are found by the jury, this is a question of law properly reserved by the court under section 317 of the Code. Such an instruction would be essential where the jury are directed to find a separate-general verdict on an issue where the verdict would turn upon the character or degree of negligence.

Judgment affirmed.

CASE 6—PETITION EQUITY—DECEMBER 2, 1884.

Matthews v. Albritton, &c.

APPEAL FROM GRAVES CIRCUIT COURT.

WHEN A DEED IS MADE TO ONE PERSON AND THE CONSIDERATION IS PAID BY ANOTHER NO USE OR TRUST RESULTS IN FAVOR OF THE LATTER *as between the parties*; but if the property is in fact held in secret trust for the party paying the consideration, his creditors may subject it to the payment of their debts, whether created prior or subsequent to the execution of the deed.

D. G. PARK FOR APPELLANT.

1. Where one party pays the consideration for land and takes the title in the name of another, under an express agreement made at the time that the party receiving the title shall hold the property in trust for the use and benefit of the party paying the purchase money, the property is subject to the debts of the *cestui que trust* at the suit of a creditor, although his debt was created subsequent to the purchase and agreement. (General Statutes, chapter 63, article 1, section 21; Crozier v. Young, 3 Mon., 159; Doyle v. Sleeper, 1 Dana, 548; Huffman v. Thomas, 2 Duvall, 106, 107; 4 Ky. Law Rep., 527-28.)

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2. Such a trust may be shown by parol in favor of a creditor of the *cestui que trust*. (Browne on Statute of Frauds, sections 82, 108; 1 Perry on Trusts, section 216.)
3. Even if the agreement was within the Statute of Frauds, the trustee having held under the trust and recognized it until the property was attached, it should be subjected. (Browne on Statute of Frauds, sections 122, 130; Crawford v. Wood, 6 Bush, 203; Clay's Heirs v. Marshall's Heirs, 5 B. Mon., 269, 272; McGrum v. Preston, 5 J. J. Mar., 335; Galway v. Shields, 27 Amer. Rep., 352; Bedinger v. Whittamore, 2 J. J. Mar., 563; Lewis v. Whitnell, 5 Mon., 191.)
4. Is the alleged agreement within the Statute of Frauds? (Perry on Trusts, volume 1, sections 75, 78, 79; Browne on Statute of Frauds, sections 80, 81; Chiles v. Woodson, 2 Bibb, 71.)

W. W. ROBERTSON FOR APPELLEES.

When a deed is made to one person and the consideration is paid by another, no use or trust results in favor of the latter. (General Statutes, chapter 63, section 19; Grant's Guardian v. Grant, 4 Ky. Law Rep.; Mannen v. Bradbury, *Ibid.*, 951; 3 Bush; 5 Bush; 7 Bush.) If the person paying the consideration can not enforce the trust, his creditor can not do so.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant brought this action to subject real property, the legal title of which is in appellee J. E. Albritton, to the satisfaction of a judgment against appellee R. T. Albritton, upon which an execution was issued and returned no property found.

It is stated substantially in the original and amended petitions that the property in question was bid for and purchased at a public sale by J. E. Albritton, who received a deed therefor, but that the purchase price was actually paid by R. T. Albritton; that the conveyance was without any consideration from the former, but under an agreement between them it was made to him, and he has ever since the sale held the property in secret trust for the use of the latter, who is the real and beneficial owner.

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The question presented by the appeal is, whether the statements contained in the original and amended petitions being taken as true, the property is subject to the payment of appellant's debt which was created since the execution of the deed to J. E. Albritton; and the determination of that question depends upon the proper meaning and application of section 19, article 1, chapter 63, General Statutes, which is as follows:

“When a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter; but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the land deeded with the effects of another.”

Before the adoption of the Revised Statutes, which contained a provision the same as the section quoted, when a deed was made conveying real property to one person, the consideration therefor being paid by another, a trust resulted in favor of the latter which he might enforce, although the deed was so made in pursuance of an agreement between them. And then, of course, there was no question of the right of creditors by proper proceedings to subject the property thus held to the payment of debts of the *cestui que trust*, whether existing at the time or created subsequent to the deed. Now, however, no use or trust results except in the two cases mentioned in section 19. And the question arises whether the change of the law was intended to apply to and affect the

rights of creditors as they previously existed, or to be restricted in its application to the parties to the transaction.

The reason for the change, so far as the parties themselves are concerned, is apparent. For generally the object and effect of an agreement whereby the legal title to real property is vested in one party, while the consideration is paid by another, is to defraud creditors and purchasers. Hence, it is now declared not to be the policy of the law to uphold and enforce a secret trust in favor of a person paying the consideration, who voluntarily consents for the legal title to be in another. But there is no reason why a creditor should be denied relief in equity whenever property for which his debtor has paid the consideration, and of which he has the actual use and benefit, is by a fraudulent arrangement placed beyond the reach of legal process. And unless it was the intention of the Legislature to extend the application of section 19 to creditors, and thus take from them a remedy they once undoubtedly had, it should not be done.

By section 20 it is provided, in express terms, that such deeds shall be deemed fraudulent as against existing debts and liabilities. But it does not necessarily follow that the Legislature intended thereby to sanction such transactions as against debts and liabilities of the *cestui que trust* subsequently created. For if it be made to appear at any time that real property for which a party has paid the consideration is in fact held in secret trust for his use, and that he does have the use and enjoyment of it, there is no reason why it should not be made subject to his debts and liabilities

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though created subsequent to the deed under which it is held. If fraudulent in the beginning as to existing debts and liabilities, the transaction continues fraudulent so long as the property is held in the same manner and for the same purpose.

It is not in terms provided in section 19, nor can it be fairly implied, that the Legislature intended to deprive the creditor of the right to subject property thus held, and, in our opinion, upon the statement of facts alleged by appellant, he was entitled to the relief sought, and the court erred in sustaining the demurrer to the original and amended petitions.

Wherefore, the judgment is reversed and cause remanded.

CASE 7—PETITION IN EQUITY—NOVEMBER 15, 1888.

Cochran & Fulton v. Anderson County National Bank, &c.

APPEAL FROM ANDERSON CIRCUIT COURT.

PARTNERSHIP—DORMANT PARTNERS—POWER OF PARTNER TO BIND FIRM.—Where two or more persons purchase one or more specific lots or parcels of property on joint account, or in the nature of a limited partnership, for the purpose alone of sale and profit, and there is no fraud or concealment as to the manner of purchase, the mere fact that one of the partners or joint owners is intrusted with the possession does not constitute the others *dormant* partners; and, therefore, the partner in possession can not pledge the property for his individual debt so as to bind the other partners. The rule of *caveat emptor* applies, and not the general rule applicable to commercial partnerships, that dormant partners can not assert a claim to the partnership property as against the creditors of the ostensible partner.

The opinion in this case was not marked for publication when delivered. It is now published by direction of the court.

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GEO. WEISSINGER FOR APPELLANTS.

1. The active, visible partner in a dormant partnership has in the eye of the law, as to creditors and purchasers, no partner at all, and has a right to dispose of the partnership effects or securities in any manner, and to bind his partners by his acts. (*Cammack v. Johnson*, 1 Green's Ch'y, 168; *Lord v. Baldwin*, 6 Pick., 848; *French v. Chase*, 6 Greenleaf, 166; *Talcott v. Dudley*, 4 Scammon (Ill.)
2. To constitute one a dormant partner, it is not necessary that he should wholly abstain from actual participation in the business of the firm, or be universally unknown as having a connection with it. (*North v. Bloss*, 80 N. Y., 374; *Kelly v. Hurlbut*, 5 Cowen, 584; *Mitchell v. Dall*, 2 Harris & Gill, 171; *Gow on Partnership*, p. 12.)

JAMES SPEED ON SAME SIDE. *

The purchaser of goods from one in possession of them has no possible means of knowing the rights or interests of dormant partners of the person in possession, and, therefore, acquires title as against such partners.

YOUNG & TRABUE ON SAME SIDE, IN PETITION FOR REHEARING.

1. A partnership may exist in a single transaction as well as in a series; if there is a joint purchase with a view to a joint sale and communion of profit and loss it is a partnership trade, although it is confined to a single thing. (*In re Warren, Daves*, 323; *Ripley v. Colby*, 3 Fost. (N. H.), 443.)
2. A partner may borrow money and pledge the partnership effects as collateral security therefor, and bind the firm to an innocent lender, though the borrowed money be subsequently misapplied; and this is true of a special partnership in a particular venture, as well as of a general partnership. (*Reid v. Hollinshead*, 4 Barn. & Cress, 837; *Story on Partnership*, sections 94, 104, 106; *Winship v. Bank of United States*, 5 Pet., 529, 561; *Livingston v. Roosevelt*, 4 John., 251; *Lindley on Partnership*, 269; *Bank of Kentucky v. Booking, &c.*, 2 Litt., 45; *McGowan, &c.*, v. *Bank of Kentucky*, 5 Litt., 271; *Burgess v. Northern Bank of Kentucky*, 4 Bush, 600.)

D. W. LINDSEY FOR APPELLEES.

1. A warehouseman's receipt for goods not in his warehouse at the time of the execution and delivery of the receipt does not pass any right or title to the holder. (*Cochran & Fulton vs. Ripy, Hardie & Co.*, 18 Bush, 496); and a mere redrafting of the original receipts after the property has been removed to his warehouse amounts only to a ratification of the original contract, and can not add to its efficacy.
2. A partner can not pledge the partnership property for his individual

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- debt. (Story on Partnership, section 94; Smith's Mercantile Law, p. 71; 18 B. M., 199; Wagnon v. Clay, 1 Mar., 257.)
3. A factor or commission merchant or agent can not pledge or mortgage the goods of his principal. (2 Kent's Com., section 41.)
 4. In a non-commercial partnership, in order to make out the liability of the firm, it must be made out affirmatively that the partner who made the contract in question had the power to make it. (Judge, &c., v. Braswell, &c., 18 Bush, 75.)
 5. A joint purchase for a particular adventure, upon an agreement to share jointly in the profit and loss, constitutes a *limited* partnership. (Crompton v. McNair, 1 Wend., 457; Bentley v. White, 8 B. M., 266.)
 6. Appellees were not *dormant* partners, but, even if they were, the law with regard to dormant partners extends only to commercial partnerships, and has no application to dormant partners in special adventures. (Pitts v. Waugh, 4 Mass., 421; Smith v. Burnham, 8 Sumner, 435; Rodgers v. Batchelor, 12 Peters; Binney v. The Banks, 5 Mason.)

P. B. THOMPSON, JR., ON SAME SIDE.

1. A partner can not pledge the assets of the firm on his individual account, and, if he does so, the pledgee risks title and holds subject to the superior title of the firm, although he may not have known that the property was that of the partnership. (Binney v. U. S. Bank, 5 Mason; Rogers v. Batchelor, 12 Peters, 229.)
2. A warehouseman's receipt for property not in his warehouse does not pass any title thereto. (Cochran & Fulton v. Ripy, Hardie & Co., 13 Bush, 496.)
3. A plaintiff claiming title under a warehouse receipt alleged to have been issued at a certain time can not recover upon proof of a warehouse receipt issued at a subsequent date, the time being material. (3 Litt., 419.)

T. C. BELL ON SAME SIDE.

1. Under the warehouse law a warehouseman has no authority to issue receipts in his own name on property not his own, and, therefore, a receipt issued by him on property which he owns jointly with another is illegal and void.
2. A secret partner is bound by the act of the ostensible partner only where the credit was given to the ostensible partner in the course of the business of the partnership and for the common benefit. The power to sell does not include the power to pledge for the individual debt of the ostensible partner. (Bank v. Binney, &c., 5 Mason, 188; Rogers v. Batchelor, 12 Peters, 232; Bentley v. White, 3 B. M., 263.)

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3. A partnership in a single adventure is not a commercial partnership, and, therefore, the general doctrine applicable to dormant partners in commercial partnerships does not apply here. The rule of *caveat emptor* applies.

THOMAS H. HANKS ON SAME SIDE.

One partner can not apply the partnership funds or property to the payment of his private debts, and the title of the other partners is not thus divested in favor of the private creditor, even if the latter was ignorant that the funds or property belonged to the partnership. (Rogers v. Batchelor, 12 Peters, 221; Daniel v. Daniel, 9 B. M., 196; Bank of Kentucky v. Herndon, 1 Bush, 359; Conwell v. Sandidge, 8 Dana, 279.)

JOHN B. LINDSEY, ON SAME SIDE, FILED REPLY TO PETITION FOR REHEARING.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

It is unnecessary to notice the preliminary questions raised by counsel for the appellee on the last hearing, and in the consideration of this case it will be treated as if all the actions had been consolidated and heard with the action in which Shipman was adjudged to have made a fraudulent preference as between creditors, bringing the case within the act of 1856. It was a case in which the entire estate of Shipman passed to creditors for distribution. It was so considered by the court below, and the only question to be settled here arises as to the conflicting liens or priorities in right in the distribution of the fund arising from the sale of Shipman's property.

The evidence conduces to show that Shipman was a private warehouseman, engaged largely in buying and selling whisky on his own account and for others. The appellants, Cochran & Fulton, became the indorsers of Shipman for a considerable

sum of money, and in order to secure them in their liability he pledged to them as collaterals certain warehouse receipts for many barrels of whisky, with the serial numbers inserted; and if this controversy was alone with the appellants and Shipman, there could be no question as to the former's right to subject the whisky to the payment of the debt for which they were bound, and which they were compelled to pay. The rights of other parties intervened and they claimed the whisky that had been pledged to Cochran & Fulton as theirs, and were adjudged to have priority in the distribution of the proceeds of the sale of the whisky by the judgment below.

The firm of Cochran & Fulton, as the proof shows, had many transactions with Shipman in the purchase and sale of whisky; and Shipman at one time purchased for the firm one thousand barrels of whisky in his, Shipman's, name, with the agreement that he, Shipman, was to have part of the profits. This was some time prior to the bankruptcy of Shipman, and has no connection with this case except to show the manner in which Shipman was conducting his business.

It is well established that he purchased and sold whisky for others as well as himself, and that he had no partner connected with him in his general business, but now and then became jointly interested with others in the purchase and sale of specific lots of whisky, the whisky being identified by serial numbers, as is usual in the trade.

Vandyke, Powell, Monroe Walker & Son, and the

Anderson County National Bank, are appellees here, and the three first named claim to have purchased, jointly with Shipman, certain specified lots of whisky that were deposited in his warehouse, and placed in each case to the account of the particular joint adventure.

Shipman and Vandyke entered into a writing evidencing their purchase of one hundred barrels of whisky, or their joint interest in the one hundred barrels. This whisky was identified by numbers and removed to the warehouse of Shipman, and there placed to the account of Vandyke & Shipman. Powell had purchased two or more specified lots, jointly with Shipman, with the whisky identified in and out of the warehouse in the same manner as Vandyke, and so with Monroe Walker & Son. These transactions did not constitute the bulk of the business conducted by Shipman, but were small lots of whisky purchased on joint account, and openly held and claimed by the parties when in the warehouse, and before it reached the warehouse, as the joint property of the parties making the purchase. Shipman disposed of most of this whisky held on joint account, not leaving enough to pay to the other joint owners their proportion of the whisky or its proceeds. They claim that in a court of equity their claim is superior to that of the appellants.

The whisky, or the several lots, was purchased for the purpose alone of being sold, and the profits, if any, divided. It is not insisted in argument that Shipman had the right to pledge the whisky belonging to others for his own debt, because it happened

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to be in his warehouse, or that he could issue warehouse receipts and pledge those receipts as security for his debts. He had the power to sell the whisky because it was purchased by the parties for that purpose, and a sale would have passed the title; but here he has pledged whisky in which these appellees had a joint interest to pay his own debt, and this can not be done. One partner in a general commercial partnership has no such right, and in a single adventure, or where the partnership is limited to two or more adventures in particular lots of whisky, or certain specified property, the right of one joint owner to pledge for his own debt can not be maintained, unless authority to do so is shown to have been given by the other parties in interest. It is conceded, or the proof shows, that the pledge was to secure Shipman's own debt, and of property that had been purchased jointly with others.

It can not be said that appellees trusted Shipman too far, for if so, the doctrine would apply to all cases where property is placed in the hands of the commission merchants to sell, either for a particular individual or on joint account, nor do we understand that such a position is urged by counsel. They have endeavored to maintain that these parties, appellees, were dormant partners, and for that reason the whisky passed by the pledge. The proof is clear that they were not partners in the general business of Shipman, for if they were, and the name of Shipman was alone used, the parties who were dormant partners can not assert a claim to the property as against the creditors of the ostensible partner. This

is the general doctrine applicable to commercial partnership; but where parties purchase one or more specific lots or parcels of property on joint account, or in the nature of a limited partnership, and this fact is not attempted to be concealed or the creditor of the one partner not misled by the others, there is no reason for the application of such a rule. If they dealt generally in the sale and purchase of whisky jointly with Shipman, and permitted him, as the ostensible partner, to possess, use and claim it as his own, it would present a different question.

No such case appears from this record. Their purchases of the lot or specified lots of whisky was made on joint account, without fraud or concealment as to the manner of the purchase. It was entered on the books of the warehouse as the joint property of the parties. The appellees concealed nothing. Either party had the right to sell, as it was purchased for that purpose, but neither had the right to pledge for his own debt. The appellants took the pledge from Shipman, believing that he was the owner; but these parties gave him no authority to pledge the whisky in that way. They had done nothing to deceive appellants, or to mislead them in the transaction with Shipman. If they were dormant partners they would be liable for appellants' debt; but when appellants purchased whisky of Shipman, or took whisky in pledge from Shipman, they must know that it is Shipman's property, or that he has the authority to sell or pledge.

Appellants ask: How were they to find out who was the owner of the property? The answer is: How

are they to find out the owner of any of the lots of whisky in Shipman's warehouse? They purchase or take the pledge at their peril. The doctrine of *caveat emptor* applies in all such cases.

Such warehouses under the warehouse law of the State are filled by whisky belonging to many parties. They are places in which whisky is stored, not alone for the owner but for others, and the owner of the warehouse has no power to issue warehouse receipts so as to pass the title against the consent of the owner. The question made in this case as to the effect of the warehouse receipts pledged as collaterals to the appellants may be simplified by asking the further question: Can one joint owner of property pledge the whole to secure his individual debt without the consent of the other; or in a case where two purchase two or three specified lots of whisky for the purpose alone of sale and profit, can one pledge the whole whisky to secure his own debt?

To either question we think there must be a negative response, and the fact that the one having the possession makes the pledge, does not affect the question or make the other a dormant partner. The only reason in this case for making the appellees dormant partners is, that Shipman had the whisky in his warehouse and the appellants did not know that the appellees had an interest in it. These appellees were not sharing the profits or interested in his general business. A dormant partner is one who takes no part in the control and management of the partnership business; but when found out, is liable like the ostensible partner, and for the reason that he is a partner.

It is not pretended that the money obtained of Shipman was applied to the payment of any debts owing by these parties for the whisky ; but, on the contrary, the facts show that they had paid in full for their interests and some of them greatly more. If one is permitted to conduct a partnership in his own name, and pledges the partnership profits for his own debt, the pledge is good, and the dormant partner, who is unknown to the creditor, will not be permitted to claim the property. No such case is presented here. Either joint owner or partner in the particular adventure had the power to sell, because it was purchased to sell. They purchased openly, and in the name of all—not in the name of Shipman alone—and had the whisky entered on the books of the warehouse as the property of both. They were not interested in the warehouse in any manner or in the general business of liquor dealers. Shipman's mode of doing business was known where he lived, but may not have been known in Louisville. All the letter-heads of Shipman showed him to be *an agent for, and wholesale dealer in, certain liquors*, and this indicated clearly that he had or might have in his warehouse whisky belonging to others.

This pledge was taken in Louisville by the appellants on the faith they had in Shipman's integrity. The appellants had done nothing to deceive or mislead them, and no case can be found where the joint owner or the party interested in the special adventure has been made to lose under the circumstances. The right and authority of Shipman was limited and controlled by the scope of the agreement or under-

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taking between them. That was to purchase these particular lots of whisky and sell them; and no authority, express or implied, was given to Shipman to pledge for his own debts.

The cases of *Lord v. Baldwin*, 6 Pickering, 348; *French v. Chase*, 6 Greenleaf, 166, and *Cammack v. Johnson*, 1 Green's Ch'y, 163, are all cases where the ostensible partner conducted the business, and the other was unknown until the liabilities were created; and the court held, particularly in *Lord v. Baldwin*, that the ostensible partner having caused others to trust him by reason of his having the possession, use, and claim as his own of the property, that it is liable for the debts of the ostensible partner; and in *French v. Chase* it was said, "Where all the creditors have trusted the man of business and the apparent owner of the goods, one of such creditors who is behind the rest in his attachment, shall not be permitted to supplant them and gain priority because he has discovered the concealed liability of a dormant partner."

The authorities referred to by counsel is where the dormant partner is enjoying the profits of the partnership business, and his name as a partner not disclosed. There was no use or claim by Shipman in this case, by the permission or consent of the appellees, to pledge this whisky for his debts. "Partners in a specific purchase or adventure have, in relation to that adventure, all the rights and are subject to all the liabilities of general partners, but the relationship ceases with the adventure and is confined to it." (*Compston v. McNair*, 1 Wendell, 463.)

One is not a dormant partner because the party who trades with the one having the possession is not aware of the fact that another is interested; if so, there would be but little security in committing to others the custody of goods for sale, either as agents or on joint account. It is argued that, because he has the right to sell, he, therefore, has the right to pledge, and for no other reason, so far as is disclosed by the facts of the record, than that the holder of the receipts in pledge did not know that appellees had an interest.

We perceive no case of dormant partnership in these transactions, and when parties appear in a court of equity the joint owner or partner in a case like this will be entitled to the property left, when it clearly appears that the partner in fault has already received more of the joint property or its proceeds than he was entitled to.

All of this whisky in controversy was covered by the purchases of Powell, Vandyke, and Walker & Son, and the *Bank* is claiming to have received a pledge of this whisky for the same reason that appellants took the receipts, not knowing that it belonged, or any part of it, to the appellees. What was left did belong to the appellees, and, therefore, the appellants are not entitled to recover. It is further argued that as Powell, Monroe Walker, &c., had more than one joint purchase with Shipman, that each adventure must pay its own losses and profits. We do not see that the question is properly raised here. The joint account between them shows the nature of the transactions, and the proof

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is, that Shipman has received his part of the whiskey.

In our opinion no error was committed to the prejudice of appellants in the judgment rendered, and it is affirmed.

DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1885.

[This case was pending until the January Term, 1885, upon a petition for an extension of the opinion; hence, its publication with the opinions of that term.]

CASE 8—PETITION EQUITY—MAY 27, 1884.

Dawson v. Lee.

Lee v. Hill.

APPEALS FROM BULLITT CIRCUIT COURT.

1. **CONSTITUTIONAL LAW—DISCRIMINATION AGAINST NEGROES—TAXATION.**—All legislation which discriminates against any particular race or class of persons is in violation of the Constitution of the United States. Therefore, State taxation for purposes of education should be provided for by general laws, applicable to all classes and races alike, all the children of the State being entitled to an equal share of the proceeds of the "Common School Fund," and of all State taxation for purposes of education.

An act, entitled "An act to establish a uniform system of common schools for the colored children of this Commonwealth," approved February 23, 1874, is unconstitutional, because, by implication, it excludes the negro children of the State from any share of the proceeds of the "Common School Fund" set apart by the Constitution, as well as from the annual tax levied on the property of white persons for school purposes.

2. **SURETIES, SIGNING OF NAME BY AGENT.**—Where the name of a person is signed as surety by an agent, he is not bound thereby unless the agent's authority was in writing signed by him. A writing signed by another for the person to be bound is not a sufficient authority.

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83	49
e110	170
83	49
f121	413
83	49
137	215

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3. **PAYMENT BY SURETY NOT BOUND.**—Where one pays a debt for which he supposes himself to be bound as surety, when in fact he was under no legal obligation to pay, he occupies no better attitude than a mere stranger or volunteer, and can not be substituted to the creditor's rights against the principal or the principal's vendee.
4. **SHERIFF—LIEN OF SURETIES—RIGHTS OF VENDEE.**—Where the sureties of a sheriff claim a lien, by substitution to the rights of the Commonwealth, upon land which the sheriff has conveyed to another, the sheriff's vendee is entitled to share *pro rata* with the sureties in the proceeds of the land, to the extent that the amount paid by him upon the purchase price was paid by the sheriff upon the revenue for which the sureties were bound; but he is not entitled to priority, the lien of the Commonwealth existing when he made the payment.
5. **PURCHASER FROM DEFAULTING SHERIFF—IMPROVEMENTS.**—Where one purchases land from a defaulting sheriff, and in good faith makes necessary improvements; without notice that his vendor has defaulted, he is entitled, as against the sheriff's sureties claiming a lien upon the land by substitution to the rights of the Commonwealth, to be re-imbursed out of the proceeds of sale to the extent that the improvements are shown to have increased the vendible value of the land.
6. **SHERIFF—TAXES COLLECTED UNDER VOID ACT.**—The Commonwealth is not entitled to money collected by the sheriff, as taxes, under a void statute, and, therefore, has no lien therefor to which the sureties of the sheriff can be substituted.

R. McCONATHY FOR APPELLANT.

Brief not in record.

F. P. STRAUS FOR APPELLEE.

Brief not in record.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellant Dawson and appellees Hill and Greenwell, to subject a tract of land owned by J. A. Lee to the payment of \$—, one-third of which they each, as alleged sureties in a revenue bond given by J. H. Hays, sheriff of Bullitt county, paid into the Treasury of the State.

Upon final hearing, personal judgment was rendered

in favor of each of the plaintiffs in the action against Hays for the sum of \$824.16, subject to certain credits mentioned, and the land was directed to be sold to satisfy, first a debt in favor of Simmons secured by mortgage executed prior to the revenue bond, and second, to pay the claims of Hill and Greenwell. But it was adjudged that Dawson is not entitled to a lien upon the land, and the petition, so far as it sought to sell it to pay his claim, was dismissed.

From the judgment Dawson & Lee have prosecuted separate appeals. But as the questions involved are connected, and only one transcript is presented, they will be heard together.

As the sale and conveyance of the land in controversy by Hays to Lee was made in April, 1881, after the execution by Hays and his securities of the revenue bond, which was done the first Monday in January, 1880, it is manifest the lien of the Commonwealth was created and existed before Lee acquired title to the land, and that those of the plaintiffs who were bound as sureties are entitled by substitution to a lien on the land for whatever amount they have been compelled to pay into the Treasury of the State by reason of the default of the sheriff.

But it was alleged by the defendant, Lee, that Dawson never, in the manner required by law, executed the revenue bond, and was not legally bound as surety to pay any part of the revenue into the Treasury of the State, and that such payment by him was voluntary, and gave him no right to the lien held by the Commonwealth upon the land purchased by Lee of the sheriff, Hays.

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It appears that the name of Dawson was signed to the bond without his presence, by the clerk of the county court, in pursuance of authority contained in a paper purporting to be a power of attorney executed in presence of one Kinnison, who signed Dawson's name, and his own as an attesting witness.

Section 20, chapter 22, General Statutes, is as follows: "No person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing signed by the principal; or if the principal do not write his name, then by his sign or mark made in the presence of at least one credible attesting witness."

"The language of the section seems to be imperative, and without exception, that in all cases of suretyship, in order that the act of one may bind another as surety, such act must be done under written authority from the one held to answer as surety." (*Billington v. Commonwealth*, 79 Ky., 400.)

In that case the name of the surety was signed not to a power of attorney but directly to a bail bond, in presence of the judge of the court, who accepted the bond, and in presence of the surety and by his direction, yet not being signed by the surety in person but by his attorney, he was held not to be liable.

One of the objects for which the statute was enacted was to correct the evil growing out of the loose practice of those whose duty it is to take official and bail bonds, and it can not be properly construed otherwise than has been done in the case referred to.

It being then clear that Dawson was not legally bound as surety upon the revenue bond executed by

Hays, the sheriff, and that the payment made by him into the State Treasury was voluntary, is he now entitled to a lien by surrogation upon the land of Lee, the purchaser, in order to indemnify himself.

“The general principle, that no one can make himself the creditor of another without his consent, or against his will, is familiar. But where one is surety for another, and pays the debt which the principal owes, the law implies that the latter requested such payment to be made, and also implies a promise to repay him. But the surety must be under some legal obligation to pay, otherwise the implication of a request to pay and promise to pay will not arise.” (Kimble v. Cummins, 3 Met., 327.)

In that case an execution upon a replevin bond in which Cummins was the surety of Kimble, being issued and levied upon the property of the former, he satisfied the debt, and then by an action in equity sought to subject certain property of his principal to re-imburse himself. But as more than one year had elapsed from the maturity of the replevin bond until the issuance of the execution which Cummins satisfied, he was by statute released from all liability upon the bond, and, consequently, as held by this court, he could not pay the debt and look to his principal for re-imbursement. For, after his release, he was no longer a surety, and, therefore, not entitled to any of the rights growing out of such relation.

In the case of *Spillman & Duff v. Smith*, 15 B. M., 134, the same principle was held applicable where the surety in a sale bond satisfied it after he became released from legal liability.

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It was thus determined in both those cases, and we think correctly, that a surety in a bond who satisfies it after he has been released as such, "occupies no better attitude than that of any other person paying the debt of another without request or authority, implied or expressed." And that a mere stranger or volunteer, who pays the debt of another, can not be substituted to the creditor's rights, is a proposition too plain and well settled to argue.

The contest here, however, is not between a surety and his principal; but a party is seeking to subject the land of a vendee to re-imburse-himself for the payment of a debt of the vendor that he never was legally liable to pay as surety or otherwise.

If he could not pay the debt after being released as surety by operation of law, and look to the principal as was held in the case of *Spillman & Duff v. Smith*, it would seem reasonable that he should not be permitted to re-imburse himself out of the land of a purchaser for the payment of a debt of another that he was never bound for at all.

Whether the vendee in such a case has or not been benefited to the extent of the payment made is not a material question. He may or may not have had sufficient security or indemnity against a breach of contract by his vendor. However, whether he had or not, it is sufficient to relieve his land from a lien in such case that the party asserting it occupies the attitude of a mere stranger or volunteer.

Upon the cross-appeal of Lee from the judgment in favor of *Hill v. Greenwell* various questions are presented:

1. It appears that after he purchased the land Lee paid to Hays, a considerable amount of the purchase money, which the latter as sheriff paid into the State Treasury in part discharge of his revenue bond for 1880, and got credit therefor. Inasmuch, as the money paid by Lee was accepted and so appropriated by the sheriff, and the sureties in the bond were to that extent relieved from responsibility, Lee is entitled at least to share *pro rata* with them in the proceeds of the sale of the land. But he is not entitled to priority. For the lien in favor of the Commonwealth, to which the sureties are entitled by substitution, already existed when he made the payment to Hays.

2. As Lee had no notice at the time he made the improvements on the land that Hays had defaulted as sheriff, and they are shown to have been necessary and made in good faith, we think he should be reimbursed therefor out of the proceeds of the sale to the extent they be shown to have increased the vendible value of the land before appellees Hill and Greenwell are paid.

3. It appears that, included in the amount with which Hays was charged as sheriff by the Commonwealth on account of revenue collected by him for the year 1880 was the sum of \$154.28 taxes assessed and collected from negroes in pursuance of an act, entitled "An act to establish a uniform system of common schools for the colored children of this Commonwealth," approved February 23, 1874.

If that act be repugnant to the Constitution of the United States the sheriff was not authorized to collect

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any money in pursuance of it, nor required, after he did collect, to pay it into the State Treasury, because the Commonwealth of Kentucky was not entitled to it, and having no right to it, the Commonwealth held no lien therefor which the sureties of the sheriff could by substitution enforce against the land of Lee.

It has been held by the Supreme Court of the United States that discriminating legislation by a State against any class of persons, or against persons of a particular race or nation, in whatever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the fourteenth amendment to the Constitution.

By section 1, article 11, of the State Constitution, the "Common School Fund" therein designated, together with any sum which may be raised in the State by taxation or otherwise for purposes of education, shall be held inviolate for the purpose of sustaining a system of common schools.

If the rule adopted by the Supreme Court in all other cases involving the construction of the fourteenth amendment to the Constitution be applied in the matter of the common school system of this State, it follows that State taxation for purposes of education should be provided for by general laws applicable to all classes and races alike, and that all the children of the State are entitled to an equal share of the proceeds of the "Common School Fund," and of all State taxation for purposes of education.

The object of the act in question, as declared therein, is to create a uniform system of common

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schools for the education of the colored children of the State; and the fund for that purpose is provided for by taxation upon the property and persons of the negro race exclusively.

It was obviously the intention of the Legislature, and such is the proper construction of the act, to exclude the negro children of the State from any share of the proceeds of the "Common School Fund" set apart by the Constitution, as well as from the annual tax levied under general laws on the property of white persons for school purposes, and to give them the benefit of only the fund provided for in the special act. In this respect, as well as regards the partial and discriminating taxation provided for, the act is, in our opinion, in violation of the fourteenth amendment to the Constitution of the United States, as interpreted by the Supreme Court.

Wherefore, the judgment is affirmed on the appeal of Dawson, and reversed on the cross-appeal of Lee, and cause remanded for further proceedings consistent with this opinion.

CASE 9—PETITION ORDINARY—MAY 7, 1885.

L. & N. R. R. Co. v. Willis.

APPEAL FROM SHELBY CIRCUIT COURT.

1. IF ONE ENGAGES THE SERVANT OF ANOTHER IN AN OBVIOUSLY DANGEROUS BUSINESS he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury

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110	930
83	57
133	674
83	57
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results immediately from the neglect or unskillfulness of the servant, nor is it necessary, to authorize the recovery, that the servant should have been employed by the defendant *for wages* when the injury was received.

2. PARENT AND CHILD—MASTER AND SERVANT.—The duty of a father to educate and maintain his minor son entitles him to the son's services, and creates the relation of master and servant between them. In this case it is held that a father is entitled to recover of a rail-road company for an injury received by his minor son while rendering the company service as brakeman on a train, under the direction of the conductor, although the son was not employed by the company *for wages*.

W. LINDSAY FOR APPELLANT.

1. As the appellant did not hire the appellee's son and was guilty of no neglect, it is not liable for an injury resulting to the boy from his voluntary attempt to render a personal service to the company's conductor.
2. As the injured boy was not an infant *of tender years*, the extreme rule contended for by counsel for appellee does not apply.

L. A. WEAKLEY ON SAME SIDE.

There is no evidence that appellant employed appellee's son, as neither the company nor its conductor exercised any control over him, or claimed any interest in him or his services. (R. R. Co. v. Kidd, 7 Dana, 245; Bosworth v. Brand, 1 Dana, 377.) And unless the appellant *employed* the boy, his father can not recover.

L. C. WILLIS FOR APPELLEE.

Brief withdrawn.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellee, W. J. Willis, recovered a judgment in the lower court for five hundred dollars for trouble and expense in caring for his son and the loss of his service, arising from an injury to him while engaged in coupling the cars of the appellant.

The father bases his right to recover upon the fact that his son was under age, and that the appellant, without his knowledge or consent, employed and permitted the son to render service for it in the hazardous capacity of brakeman.

The answer denies the allegations of the petition, and alleges affirmatively, among other matters, that the injury resulted solely from the son's negligence.

If this statement were material, yet it is denied, because the order filing the answer recites that, by consent, its affirmative statements are traversed.

It appears that the son had, prior to the date of the injury, been in the employ of the appellant for wages, but had been discharged; and that when the injury was received he was voluntarily acting as brakeman, by the request or at the instance of the conductor in charge of the train.

It consisted of sixteen cars, and had but one brakeman, beside the son, upon it, although, according to the testimony, at least three were necessary or usual; and, although the conductor testifies that he did not know when or where the son boarded the train, yet it is quite evident that he, as appellant's general agent for all purposes relating to the running of it, knew, long before the accident occurred, that the son was rendering the appellant service as brakeman, and, in fact, the conductor was giving directions to him as such and as to the very work he was doing when the accident occurred.

It is not necessary that he should have been employed for wages when the injury was received in order that the father may recover. If he was then rendering service for the appellant by the request or direction of its general agent as to the business in hand, and which was certainly of a character dangerous to life and limb, then, being under age, it

was a wrongful interference with the right of the appellee to control him.

The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over him by the general agent of the appellant at war with the father's rights. The appellant can not shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was its duty to know that the appellee was willing to it before it took control of him.

The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another, renders the latter liable at least for any injury that was likely to result from such illegal conduct. If one engages the servant of another in an obviously dangerous business, he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskillfulness of the servant, owing to the fact that the person, by so illegally interfering, assumes all the risk incident to the service.

The instructions in the case conform to this rule. The lower court, in saying in the first instruction, that if the son was "*employed*," etc., must be understood as meaning simply that if the son was then rendering service for the appellant, and not

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that he must have been engaged at the time under a contract for wages; and there is, therefore, no conflict between the evidence and the instruction, and it does not seem to us to assume, as counsel claim, that the conductor had the authority from the appellant to employ the son.

Judgment affirmed.

CASE 10—PETITION EQUITY—MAY 7.

Gayle, &c., v. Owen County Court.

APPEAL FROM OWEN CIRCUIT COURT.

1. **MANDAMUS IS THE PROPER REMEDY** to prevent the clerk and judge of the county court from recording the vote upon a "local option" law, if the law is unconstitutional.
2. **IN THE MATTER OF A LICENSE TO KEEP A HOTEL OR TO RETAIL SPIRITUOUS LIQUORS**, the judge of the county court has a large discretionary power; and, while this discretion is judicial, the chancellor will not control its exercise or prohibit the inferior court from acting when the case is within its jurisdiction.
3. **CONSTITUTIONAL LAW—TITLE OF ACT.**—None of the provisions of a statute should be regarded as unconstitutional when they all relate directly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title.

An act, entitled "An act to authorize a vote to be taken on the proposition as to whether or not spirituous liquors shall be sold as a beverage" in a particular county, is not unconstitutional, because it provides the manner in which druggists shall sell, or physicians shall prescribe, such liquors.

4. **THE FACT THAT ONE OR MORE PROVISIONS OF AN ACT ARE UNCONSTITUTIONAL** does not invalidate so much of the act as is not open to constitutional objection, when, if the objectionable features are stricken out, the law can be enforced or is still a complete law.

Certain provisions of the statute, considered in this case, which change the rules of evidence, are of doubtful constitutionality; but this will not prevent the punishment of offenders under the ordinary rules of evidence.

88	61
86	437

88	61
103	451

88	61
110	501

88	61
125	569

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5. THE LEGISLATURE HAS THE RIGHT TO DETERMINE WHO SHALL VOTE UPON A "LOCAL OPTION" LAW.

An act authorizing a vote to be taken on the proposition as to whether or not spirituous liquors shall be sold in a county is not unconstitutional, because it allows districts in which "local option" is already in force to vote on the question, all being directly interested in the result.

6. IRREGULARITY IN TAKING VOTE.—The fact that in voting upon "local option" the voters were not asked the precise question prescribed by the act, under which the vote was being taken, does not invalidate the vote.

O. B. HALLAM FOR APPELLANTS.

1. The appellants were entitled to any one of the three remedies: mandamus, prohibition and injunction. As to mandamus. (Civil Code, section 477.) As to prohibition. (Civil Code, section 479; Pennington v. Woolfolk, 79 Ky., 18.) As to injunction. (High on Injunctions, sections 8, 12, 30, 61, 496, 574, 596, 795, 901, 906, 1298, 1299, 1308, 1818, 1819, 1827; L. & N. R. R. Co. v. Warren Co. Ct., 5 Bush, 247; Campbell Co. Ct. v. Taylor, 8 Bush, 206; Allison v. Louisville, H. C. & W. R. R. Co., 9 Bush, 252; Burnet v. Cincinnati, 3 Ohio, 78.)
2. The act of May 9, 1884, submitting to the voters of Owen county the question of "license" or "no license" is unconstitutional, because it did not provide for its submission to the people immediately affected, and the election provided for was not free and equal. (Acts 1883-4, volume 2, page 1442; Anderson v. Commonwealth, 18 Bush, 485.)
3. The act is unconstitutional because the title of the act purports to forbid only the *sale* of liquor as a *beverage*, while the body of the act imposes a penalty for selling for *any purpose*, and also for *giving* or *furnishing*.
4. The act is invalid because it makes the certificate of the examining board of the result of the election *conclusive* evidence that all proceedings under the act were regularly and properly had; and because its provisions are in violation of the rule that the innocence of the accused is presumed until his guilt is proved beyond a reasonable doubt. (City of Louisville v. Cochran, 5 Ky. Law Rep., 848; Cooley's Constitutional Limitations, 309, 353, 368; Varden v. Mount, 78 Ky., 89; Taylor v. Porter, 4 Hill, 140; Westervelt v. Gregg, 12 N. Y., 209.)
5. Great caution is necessary in upholding a part only of a law. (Cooley's Constitutional Limitations, 179, 186.) And where a law is submitted to the people, if a part falls all must fall. (State of Ohio v. Commissioners of Perry Co., 5 Ohio State, 507.)

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W. MONTFORT ON SAME SIDE.

1. The act under consideration is unconstitutional because the title refers only to the sale of liquor *as a beverage*, while the body of the act provides penalties for the sale *for any purpose*; and because the act changes the rules of evidence in several important particulars, of which there is no suggestion in the title.
2. The act is unconstitutional because it provides for an election which is not "free and equal."
3. If any one of the provisions of the act is unconstitutional, the whole act must fail, because it was submitted to the people for enforcement as a whole.
4. The only adequate remedy of the appellants is an injunction to prevent the recording of the vote. (Reference is made to the authorities cited by Mr. Hallam.)

THOMAS R. GORDON FOR APPELLEES.

1. The submission of the act to all the voters of the county, whereas some of the districts of the county were not to be affected by the result, was a matter of legislative policy with which the courts have nothing to do. (Cooley's Const. Lim., 197-8.)
2. None of the provisions of a statute should be regarded as unconstitutional when they all relate directly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title. (Phillips v. Covington and Cincinnati Bridge Co., 2 Met., 219; Smith v. Commonwealth, 8 Bush, 112.)
3. The Legislature has the right to compel a person to know that no liquor is being sold on premises under his control while any public meeting is being held or any public business is being transacted. (General Statutes, chapter 47, section 7.)
4. The Legislature may delegate to the voters of a county or district the power to pass upon the question of "license" or "no license." (Anderson v. Commonwealth, 18 Bush, 485.)
5. If any of the provisions of the act are objectionable, they are not so interwoven with the rest of the act that they can not be disregarded, and the act still enforced.
6. The court will not enjoin threatened prosecutions at law upon the ground of the unconstitutionality of an act of the Legislature, under which the prosecutions are about to be brought. (Cooley's Const. Lim., section 64; High on Injunctions, volume 2, section 1553; *Ibid.*, volume 1, section 7.)
7. If there be doubt as to appellants having any equitable claim, the injunction should be dissolved. (Bedford v. Potter, 9 Phil. (Pa.), 560.)
8. Appellants have not applied for a writ of prohibition or mandamus as required by the Code. (Civil Code, section 474.)

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3. The courts will presume in favor of the validity of a statute until the violation of the Constitution is proved beyond a reasonable doubt. (Cooley's Const. Limit., pages 192, 193, 196, 218, 219.)

JOSEPH BLACKWELL ON SAME SIDE.

1. Appellants were not entitled to an injunction. (High on Injunctions, sections 7, 9, 46, 64, 90, 1809, 1826, 1558, 1556; Story's Equity Juris., volume 2, section 955; Cooley's Const. Limit., page 197.)
2. The court will not pass upon the constitutionality of a statute, if the cause can be determined without doing so. (Cooley's Const. Limit., page 196.)
3. The right to have one's controversies determined by existing rules of evidence is not a vested right. (Cooley's Const. Limit., page 452.)
4. The provisions of the act under consideration are not foreign to the subject expressed in the title. (Phillips v. Covington and Cincinnati Bridge Co., 2 Met., 222.)
5. A statute may be upheld and enforced, although some of its provisions are unconstitutional. (Cooley's Const. Limit., page 212.)

The full title of the act considered in the opinion is as follows: "AN ACT authorizing the voters of Owen county to vote at the August election, 1884, on the proposition as to whether or not spirituous, vinous or malt liquors, or any mixture thereof, may be sold in Owen county as a beverage." (Acts 1883-4, volume 2, page 1442.)

So much of the eighth section of the act as is referred to in the opinion as objected to, is as follows: "And in any prosecution, when it shall appear that any spirituous, vinous or malt liquors, or any mixture thereof, has been prescribed, the burden of showing that the prescription was needed as a medicine shall be upon the accused."

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

By an act of the Legislature approved May 9, 1884, the voters of the county of Owen were authorized to vote at the ensuing August election on the proposition "as to whether or not spirituous, vinous or malt liquors, or any mixture thereof, may be sold in Owen county as a beverage."

The officers of the election were required to propound to each voter who might vote the question:

"Are you in favor of the sale of spirituous, vinous and malt liquors in Owen county as a beverage?" and when the vote is cast to record it for or against the proposition, so as to express the will of the voter on the question.

The election seems to have been conducted as required by the provisions of the act, resulting in a majority vote against the sale of liquor as a beverage.

The appellants, several in number, who were hotel-keepers in the county at the time the vote was taken, and engaged in retailing spirituous, vinous and malt liquors, made, or some of them, application to renew their tavern license with the privilege of selling ardent spirits. The county judge refused to grant the license, and from this refusal the appellants have resorted to a court of equity, alleging that the county judge refused to renew the license in anticipation of the vote about to be taken under the act, believing that a majority of those within the particular locality were in favor of the law, and opposed to the sale of liquor as a beverage, or that a majority in the county would favor prohibition: that the county judge had no other reason for denying the several applications, and by reason of such action on his part, and the additional reason that the act was unconstitutional, and, if enforced, would work irreparable injury in reducing the value of their property and destroying their business, they applied to the chancellor for an injunction, enjoining the clerk and judge of the county court from spreading on the records of the court the result of the vote which, when made of record by the provisions of the act, was to be evidence that all proceedings under it were

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properly and regularly had. An injunction was granted, and by an amended petition a mandamus was asked for directing the judge and clerk to refrain from exercising this ministerial duty. No objection was taken below to the manner in which the action was instituted, or the question raised as to the right of the several hotel-keepers who, if wronged, had each an independent cause of action to unite as plaintiffs, and present in the one action their several complaints, and, therefore, it is unnecessary to determine this question.

The act had been assailed upon the ground that it is in violation of the Constitution, and the decision of this question determines the right of the appellants to the relief sought. If the act is constitutional, and their application heard by a tribunal having the sole jurisdiction to pass on the facts, there can be no equity in their petition.

In such a case the influences operating on the mind of the judge in the decision of the case, either for or against the parties, is not the subject of investigation by the chancellor, nor would he interpose by injunction to restrain the action of the county judge, however erroneous his decision might have been on the merits of the application. The resort to a mandamus was the proper remedy to prevent the entry of the vote upon record if the act was unconstitutional, and whether an injunction could be resorted to as another and distinct remedy is not material to decide.

In the matter of license to keep a hotel, or to retail spirituous liquors, the judge of the county court has a large discretionary power, and while this discretion

is judicial, the chancellor will not control its exercise or prohibit the inferior court from acting when the case is within its jurisdiction. The judge, from his own knowledge, may suspend or arrest the exercise of such a privilege when conferred. No one is presumed to know more of the wants of the people he represents than the judge of the county court, and certainly no one more interested in elevating their moral and social condition; still, if the act is unconstitutional, it should not be made the ground for refusing future applications; and as the case is here, and that question fully discussed, it is proper to pass on the constitutionality of the act.

The title of the act "authorizes the vote to be taken on the proposition to sell spirituous liquors as a beverage;" and it is argued, because some of the provisions of the act prescribes new rules of evidence for punishing those who violate its provisions, and fixes a penalty against druggists, etc., that such subjects are foreign to the title, and have no direct connection with it.

In *Phillips v. Covington Bridge Company*, 2 Met., 222, and in many other cases, this court has said, "that none of the provisions of a statute should be regarded as unconstitutional when they all relate directly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title." There is no provision of the act but what has a direct connection with the subject-matter of the title. The law enacted is to prohibit the sale of spirituous liquors in the county of Owen, and to be enforced when a majority of those voting favor

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the proposition. It is declared an offense to sell, and the penalty is imposed; the law is declared; the punishment is fixed, and the remedy given, all having a direct connection with the title of the act; and without such provisions the law would be incomplete. That it provides the manner in which druggists shall sell or physicians prescribe it, is not foreign to the title, but embraced by it, and has a natural connection with it. The fact that when the selling is at a meeting or gathering of people, the law conclusively presumes that those in charge of the meeting furnished the liquor, is of doubtful constitutionality; still this will not prevent the punishment under the ordinary rules of evidence, and if the objectionable feature is erased from the act leaves it a complete law; and so of the questions made under the eighth section. The fact that some one or more provisions of an act are unconstitutional does not invalidate so much of the act as is not open to constitutional objection, when, if the objectionable features are stricken out, the law can be enforced or is still a complete law.

The second ground of objection is, that the election was not free and equal, because some of the districts in the county had already voted local option, and were not to be affected by the result; that if a majority voted against the law, local option still prevailed in those districts. This was a mere question of legislative policy to be determined by the Legislature and not the courts. By legislative enactment it had been provided that certain districts should sell whisky, and that right denied or not given to other

districts in the same county ; and it might as well be maintained that it was unconstitutional to give one part of the county the right to sell and deny the right to the other, as to say that the Legislature had no power to leave this question in the same condition it was when the law was passed, in the event its provisions were rejected by a majority vote.

The same rules do not govern this character of elections or prevail that must be followed in the election of officers under the Constitution ; in fact, the voters are not enacting the law but the Legislature ; and as a matter of favor to the people or the voters, the Legislature has in effect provided that it shall not become operative until a majority vote approves it. In consulting the wishes of the people no voice should have been silenced, as all were directly interested in the result. Those in favor of the retail of whisky in the local option district were permitted to vote as well as those opposed to it. (*Commonwealth v. Weller*, 14 Bush, 218.)

The Legislature has consulted the will of each and every person who can receive its benefits, and who was a legal voter under the Constitution ; and in *Marshall v. Donovan, &c.*, 10 Bush, 681, those were allowed to vote who had no such constitutional right, but upon whom the burden of taxation rested, and, therefore, would receive the benefits. The Legislature has selected the agencies in this case to determine the final effect of the statute, and this right or power in the Legislature has been too long conceded to be now regarded as an open question.

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It is further insisted that the voters were not asked, when voting, the proper question. They were asked this question: "Are you in favor of the sale of spirituous, vinous or malt liquors in this county?" While the act required them to be asked: "Are you in favor of the sale of spirituous, vinous and malt liquors in Owen county as a beverage?" There is no fraud alleged, or any fact showing that the voters were deceived or in ignorance of the provisions of the act in regard to which they were voting, nor would such an irregularity have invalidated the election. The order for the election had been entered on the order-book of the county by the county judge, and the same published for weeks before the election. An intelligent people must be presumed to have known what they were voting for; and, besides, the questions propounded were as much prejudicial to the one side as the other, and that a majority voted for the measure is not controverted.

It results, therefore, that the judgment denying the mandamus and dissolving the injunction was proper, and is, therefore, affirmed.

CASE 11—PETITION EQUITY—MAY 9.

Fitzgerald, Trustee, &c., v. Milliken, &c.

APPEAL FROM M'CRACKEN COURT OF COMMON PLEAS.

AFTER ONE HAS CEASED TO BE CLERK HE CAN NOT LAWFULLY SIGN HIS NAME OFFICIALLY TO A CERTIFICATE on the deed-book, and, therefore, where a clerk's certificate of acknowledgment to the deed of a

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married woman which has already been recorded, is not signed by him until after he has ceased to be clerk, it affords no evidence that the deed has been acknowledged, and does not make the deed effectual.

W. G. BULLITT FOR APPELLANT.

1. Since the adoption of the General Statutes, a married woman can not, by parol proof, contradict the certificate of the county clerk to a deed executed by her, as to the things he is by law required to certify in regard to signing and acknowledging deeds. (General Statutes, chapter 81, section 17; Harpending's Ex'rs v. Wylie, 14 Bush, 380; Pribble v. Hall, 13 Bush, 61.)
2. Clerks may alter records to conform to facts where such alteration does not change the rights of the parties. (1 Bush, 505.)
3. What was done by the ex-clerk in this case was not an alteration of the record, but simply the completion of it.

W. D. GREER FOR APPELLEES.

1. The clerk had no right to sign the certificate on the deed-book after he had gone out of office.
2. His certificate was not good, in any event, because it did not include the deputy's memorandum of acknowledgment. (General Statutes, chapter 24, section 38; 11 Bush, 595; Jefferson County Building and Loan Association v. Heil, &c., 5 Ky. Law Rep., 539; 5 Ky. Law Rep., 850.)
3. A clerk has no right to sign the name of his predecessor to a recorded certificate, where that officer's signature has been omitted, unless the original instrument is still in his office. (General Statutes, chapter 24, section 26.)
4. The clerk's certificate can be attacked for either fraud or mistake. (General Statutes, chapter 81, section 17; 13 Bush, 65.) The proof in this case shows that the deputy taking the acknowledgment was intoxicated, and, therefore, the grantor should be allowed to show that what he certifies is not true.
5. The recording avails nothing if the certificate is defective. (Miller v. Henshaw, 4 Dana, 327; Hughes & Co. v. Coleman, &c., 10 Bush, 248; Ford, &c., v. Teal, 7 Bush, 156; Woodhead v. Foulds, 7 Bush, 222.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

May 5, 1875, appellees, B. H. and Mary B. Milliken, husband and wife, executed a deed for a lot of land owned by her to Harriet L. Milliken, his mother, who, uniting with other parties, mortgaged

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it and other lots to appellant, The Mercantile Trust Company, of New York, to secure the payment of \$3,000 loaned, a portion of which B. H. Milliken received; and May 29, Harriet L. re-conveyed the lot in question to Mary B. Milliken encumbered with the mortgage mentioned.

The main question presented on this appeal is, whether the lot can be subjected to the payment of any part of the mortgaged debt, and the determination of it depends upon whether the deed of May 5 was effectual to divest Mary B. Milliken of her title thereto.

From an authenticated copy of the record filed in this case, it appears that the deed, together with a certificate by J. Spence, at the time clerk of the county court, showing the acknowledgment before him by the grantors in due form of law, is now of record. But appellee, Mary B. Milliken, in her pleading states that she never acknowledged the deed before any officer authorized by law to take her acknowledgment; that the contents and effect of it were never explained to her separately and apart from her husband; that she did not, before signing, understand the purport of it; and the certificate now appearing to it on the deed-book was made by mistake on the part of the officer.

Although, in the certificate purporting to have been signed by J. Spence in his official capacity, it is stated that the deed was acknowledged before him by B. H. and Mary B. Milliken, the evidence in this case places it beyond question that if acknowledged at all by her, it was done, not before

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him, but a deputy clerk. It is also conclusively established that the certificate recorded with the deed was not signed by him, or any one for him, while he held the office; but after his term expired he subscribed his name as clerk to it on the deed-book.

Whether the certificate, as it now appears on record, or even a memorandum showing acknowledgment by the grantors, was ever indorsed on the original deed does not appear, for it is not filed in the case, nor is there any evidence on the subject.

The deed of a married woman, to be effectual, must be acknowledged before some authorized officer, and lodged for record. And when recorded, it must appear from the certificate of the clerk recorded with it that it has been acknowledged as required by law before him, or some other officer. But if the official signature of Spence was not, while he was clerk, subscribed to the certificate of acknowledgment by himself or deputy, there was, when he went out of office, no evidence of record of such acknowledgment; for in legal contemplation there was no certificate, by which alone the fact can be shown, recorded with the deed.

Is, then, the certificate, signed after he ceased to be clerk, such as to make the deed effectual?

This inquiry is not precluded by section 17, chapter 81, General Statutes, for it applies to facts officially stated by an officer in respect of a matter about which he is required by law to make a statement in writing in the form of a certificate; and, manifestly, it was not intended by the section to

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give unquestioned verity to the act of an ex-clerk, involving an alteration of, or addition to, public records affecting titles to real estate.

The successor of Spence might have been authorized to record the original deed, if it had appeared to him from an official indorsement thereon to have been duly acknowledged and lodged for record, at the same time making his certificate conform to the facts and recording it. But not even he had authority to subscribe his name officially to what purported to be a certificate of his predecessor, already recorded, but not signed. Nor would he have had authority to make and record his own certificate without the original deed before him.

After Spence ceased to be clerk he could not lawfully or truthfully sign his name officially to the certificate on the deed-book; and it being clearly shown by the evidence, as we think may be done, that the certificate was not officially signed by a person authorized or required by law to do so, it affords no evidence of the essential fact that the deed was acknowledged by Mary B. Milliken, and, consequently, her title did not pass thereby to Harriet L. Milliken, and the lot is not subject to the mortgage debt.

The judgment is affirmed.

Jones, &c., v. Life Association of America.

CASE 12—PETITION ORDINARY—MAY 12.

Jones, &c., v. Life Association of America.

APPEAL FROM HICKMAN CIRCUIT COURT.

INSURANCE—NON-PAYMENT OF PREMIUM.—An insurance company having become insolvent and ceased to do business, the non-payment of a premium by a policy-holder does not work a forfeiture of the policy, although the policy provides that it shall be void if the insured shall fail to pay the premiums as stipulated.

WHITE & TAYLOR FOR APPELLANTS.

An insurance company can not escape the payment of a policy issued by it upon the ground that the insured failed to pay a premium when due, the insured having failed to pay because the company had become insolvent and ceased to do business. (*Buckbee v. U. S. Insurance, Annuity and Trust Co.*, *Bigelow's Ins. Rep.*, 406; *Ins. Co. v. Little*, *The Reporter*, volume 5, page 262; *Attorney-General v. Guardian Mutual Life Ins. Co.*, *Ibid.*, volume 10, page 603; *N. Y. Life Ins. Co. v. Clopton*, 7 Bush, 182.)

EDWARD W. HINES ON SAME SIDE.

1. The insurance company, having become insolvent and ceased to do business, thus placing it out of the power of the insured to pay the premium as provided in the policy, can not claim a forfeiture because of the failure to pay. (*People v. Empire Mut. Life Ins. Co.*, 92 N. Y., 108; *N. Y. Life Ins. Co. v. Clopton, &c.*, 7 Bush, 188; *May on Insurance*, section 358.)
2. The insurance company having ceased to do business, and the insured being dead, the damage is the face value of the policy. (*People v. Security Life Ins. and Annuity Co.*, 78 N. Y., 129.)

No brief for appellee.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This was an action instituted by the widow and children of Wood M. Jones, on an insurance policy issued by the Life Association of America, on the life of Jones, for \$5,000. The consideration was the annual payment by the insured of \$145 and interest, the premium to be paid on the 4th of March in

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every year during the life of the insured; the payments to be made at its office in the city of St. Louis, the policy providing *that if failure shall be made in the payment of any sum as stipulated in the policy, then, and in such case, the policy to be null and void, etc.*

A demurrer was filed to the petition and sustained on the ground that the policy had been forfeited by reason of the non-payment of the seventh premium, falling due on the 4th of March, 1877. It is alleged in the petition that six annual premiums had been paid, and when the seventh premium became due the insured was able, ready and willing to pay his money, but ascertained (alleging the fact to be true) that the insurance company had failed and ceased to do business, and announced their purpose of making an assignment of its effects. That before the eighth premium became payable, and shortly after the death of the insured, in an action pending against the company in the State of Missouri by the Superintendent of the State Insurance Department, an order was made by which the latter took charge of all the assets of the company. Did the fact that the insurance company became insolvent and ceased to do business excuse the insured from paying the seventh premium? is the only question to be determined in this case."

The demurrer is an admission of the truth of the facts alleged; and, therefore, we see no reason why the appellees should not have been required to answer.

In the first place it is alleged that the company had

ceased to do business, and if so, there was no place at which the premium could have been paid, and with the further allegation of insolvency, it would have been unreasonable to have compelled the insured to pay his money year after year to an insolvent company that is admitted by the pleadings to have been unable to comply with its contract. If the money had been paid it might have enlarged the assets so as to increase the dividend in a final distribution between those entitled, without resulting in any benefit whatever to the insured. If insolvent, the amount of the seventh premium might and probably would have exceeded the amount of the dividend to which the insured would have been entitled under a distribution made by the assignee; and for this reason, if no other, it would be unjust to require the insured to part with his money in consideration of an undertaking that could never be complied with on the part of the party receiving it.

The obligation to comply with the contract of insurance was mutual, the one as much liable as the other, and the insolvency of the company was a sufficient excuse for withholding the payment by the insured. In the case of the *People v. Empire Mutual Life Insurance Company*, 92 New York, 108, it is said: "The implied contract of an insurance company with its policy-holders is, that it will continue to do business, keep on hand the funds required by law for the security of its patrons, and remain in a condition, so long as its contracts continue, to perform its obligation, and when it fails to do this it has broken its engagements."

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Here the company or the party representing it is claiming a forfeiture by reason of the non-payment of the premium, and at the same time admitting that if the money had been paid it could not have complied with its contract.

Such a defense will not be permitted in a court of equity, and the court below should have overruled the demurrer requiring the defense to make an issue, and upon a failure to do so a judgment should have been rendered for the plaintiffs. The extent of the recovery is a question not presented by the record.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

83	78
87	518

83	78
128	71

CASE 18—PETITION EQUITY—MAY 14.

Fritschler, &c., v. Koehler, &c.

APPEAL FROM CAMPBELL CHANCERY COURT.

1. **FRAUDULENT CONVEYANCES—LIMITATION.**—Where an action to set aside a conveyance as fraudulent is commenced more than five years after the time the conveyance was acknowledged and lodged for record, the plaintiff can avoid the plea of limitation only by pleading and showing that the alleged fraud was discovered within five years before the commencement of the action; and where the action is by an assignee, it not appearing when the debt was assigned, it is not sufficient for the plaintiff to allege that he did not discover the fraud within five years before the commencement of the action, since the *assignor* might have done so within that time and before the assignment of the debt.
2. **THE CAUSE OF ACTION IS DEEMED TO HAVE ACCRUED** at a time when, by the exercise of ordinary diligence, the discovery of the fraud ought to have been made; and the recording of the conveyance is a circumstance which it is proper to consider in determining when the discovery might have been made.

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3. AFTER TEN YEARS FROM THE PERPETRATION OF THE FRAUD no action can be brought to set aside a conveyance as fraudulent, it matters not when the fraud was discovered.

NELSON & WASHINGTON FOR APPELLANTS.

Brief not in record.

JOHN S. DUCKER FOR APPELLEES.

1. The deed attacked in this case has all the badges of fraud. The consideration was inadequate, and was paid out of the wife's *general* estate, and not out of her *separate* estate. (Adams' Assee. v. Branch 8 Ky. Law Rep., 179; Adams' Ex'r v. Orear, 80 Ky., 184; Stokes & Son v. Coffey, &c., 8 Bush, 537; Fisher v. Shelver, 18 Rep., 95; Carpenter v. Tatro, 36 Wis., 297; Horton v. Dewey, 18 Rep., 224; Ferguson v. Hellman, 14 Rep., 383; Kaiser v. Waggoner, 14 Rep., 432.)
2. An action to set aside a conveyance as fraudulent may be brought at any time within five years after the *discovery* of the fraud, and where the conveyance is voluntary the mere recording of it is not notice to an antecedent creditor. (Ward v. Thomas, 5 Ky. Law Rep., 495.)

E. W. HAWKINS ON SAME SIDE.

1. The conveyance by the husband to the wife of *all* of his estate, when he was indebted, was fraudulent as to his creditors. (Adams' Assee. v. Branch, 8 Ky. Law Rep., 179; Fisher v. Shelver, 18 Rep., 95.)
2. As the fraud was first *discovered* within five years before the institution of the action, limitation is not a bar. (Adams' Assee. v. Branch, 8 Ky. Law Rep., 179; Ward v. Thomas, 5 Ky. Law Rep., 495.)
3. The record shows that the plaintiff obtained the note sued on before the fraudulent deeds were executed, and, therefore, it is not material when his assignor discovered the fraud.
4. The plea of limitation is not good, in that it does not state that the fraud was discovered more than five years before the commencement of the action.

BUTLER HAWKINS ON SAME SIDE IN PETITION FOR REHEARING.

1. The plaintiff's pleadings show that he was the owner of the note sued on at the time the fraudulent deeds were executed, and, therefore, it is immaterial as to when his assignor discovered the fraud. (Ward v. Thomas, 5 Ky. Law Rep., 495.)
2. The parties having gone to trial upon the issue as to whether the *plaintiff* discovered the fraud within five years before the action was commenced, and not whether his assignor made such discovery, they should at least be allowed to try the latter issue.
3. The plaintiff can not be required to prove that his assignor did not discover the fraud, as the law does not require impossibilities.

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JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

November 14, 1870, Mathias Fritschler, for the recited consideration of \$2,000, conveyed to Henry Dornhoefer four parcels of land, and on the same day, for the same recited consideration, the latter conveyed the land to Barbara Fritschler, wife of the former.

September 28, 1880, appellee Koehler commenced an action in equity for the purpose of subjecting the real estate mentioned to the satisfaction of a judgment recovered by him against Mathias Fritschler in February, 1879, for \$924, upon which an execution had been issued and returned no property found.

In his petition, he states that the foundation of the action in which he recovered the judgment was a note for money loaned to Mathias Fritschler in 1866, at which time the note was executed and delivered to the payee, who assigned and transferred it to appellee.

He farther says, that the deeds mentioned were made without consideration of any kind, and with the fraudulent intention on the part of appellants, Mathias and Barbara Fritschler and Dornhoefer, to defraud, hinder and delay the creditors of the first named; and, therefore, prays that the deeds be held void, and the real estate be subjected to the payment of his debt.

In their answer, appellants deny the deeds of November 14, 1870, were executed without consideration, or for the fraudulent purpose stated in the petition; and for farther defense plead and rely on the statutory bar of five years.

Appellee, in his reply, alleged that he resided outside the State of Kentucky, and was unacquainted with the records of Campbell county until two months prior to the commencement of the action, and did not previously discover the fraud charged in his petition.

To this reply appellants rejoined that appellee had notice of the conveyances mentioned, and sufficient knowledge of the facts to put him on inquiry more than five years before the commencement of the action, and could, by the exercise of ordinary diligence, have discovered all the facts and circumstances, and their effect, within six months next after the deeds were recorded. And in his sur-rejoinder appellee denied these allegations, thus making an issue as to whether appellee had notice of the execution of the deeds, or knew enough facts to put him on inquiry as to the character and effect of the conveyances, five years before the commencement of the action; or by the exercise of ordinary diligence might have discovered the facts in relation to the conveyances and their effect, within that time.

We do not deem it necessary to determine whether the conveyances made in 1870 were or not fraudulent, inasmuch as, in our opinion, the defense of limitation is sufficient to defeat the action.

The time fixed by section 2, article 3, chapter 71, General Statutes, within which an action for relief, on the ground of fraud, shall be commenced, is five years. But it is provided by section 7, same article, that "in actions for relief for fraud or mistake, or damages for either, the cause of action shall not

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be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract, or the perpetration of the fraud."

As has been held by this court, the statutory bar of five years was intended by the Legislature to apply to this class of cases; and where more than five years have elapsed from the time the conveyance is acknowledged and lodged for record when the action is commenced, it can only be avoided by pleading and showing the alleged fraud was discovered within five years; but no action can be brought after ten years from the perpetration of the fraud.

It is often difficult to determine at what time the discovery of the fraud has been made by a party seeking to set aside a conveyance alleged to be fraudulent, and more difficult for the defendant to negative the positive allegation of the plaintiff as to the time of the discovery, which is generally entirely within his own knowledge. This court has, therefore, held that the cause of action shall be deemed to have accrued, and the limitation to commence running at a time when, by the exercise of ordinary diligence, the discovery of the fraud ought to have been made; and while the recording of the conveyance may not be constructive notice to prior creditors, it is a circumstance which it is proper to consider in determining when the discovery might have been made.

The debt in this case was created in 1866, four years before the conveyances were made; but this action was not commenced until less than one month before the expiration of ten years from the recording of the

deeds. While this fact is not necessarily conclusive, it is persuasive that the cause of action did accrue more than five years before the commencement of the action. But it is not necessary to determine this issue of fact, for the plea of avoidance by appellee is not sufficient. When he discovered the alleged fraud, or when he might have done so by the exercise of ordinary diligence, is not the decisive or even a pertinent question. But the question is, when did the cause of action accrue? He states in his petition that the note on which he obtained judgment was assigned to him by the original payee, but when it was so assigned he does not state or show. It might, therefore, be true that he did not discover the fraud within five years before the commencement of the action, nor could have done so by the exercise of ordinary diligence; nevertheless, the cause of action might have accrued by reason of the discovery by his assignor of the alleged fraud before he assigned the note to appellee, and more than five years before the commencement of the action. It might be that the original payee, by his laches, was barred of his right of action, and yet have afterwards transferred the debt to appellee.

It seems to us it should have been alleged and shown that the cause of action did not accrue, by reason of the discovery of the fraud, within five years before the commencement of the action, and that the facts stated by appellee are not sufficient to avoid the statutory bar of five years; and the court erred in subjecting the real estate conveyed by the deeds of 1870 to appellees' debt.

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The cross-action by John Dornhoefer was not commenced until more than ten years after the conveyances were made; and, besides, the judgment which he seeks to have satisfied out of the property in question is founded on a debt of Henry Dornhoefer, one of the parties to the deeds of 1870, alleged to have been fraudulent; and as he could not, if alive, maintain an action to subject the property on the ground of it having been fraudulently conveyed to appellant Barbara Fritschler, neither can appellee John Dornhoefer, who acquired the debt as his heir-at-law, do so.

Wherefore, the judgment rendered in favor of appellees, Koehler and Henry Dornhoefer, are both reversed, and cause remanded with directions to dismiss the petition and cross-petition.

83	84
114	139

83	84
119	74

 CASE 14—PETITION EQUITY—MAY 14.

Bethel, &c., v. Smith, &c.

APPEAL FROM HARDIN CIRCUIT COURT.

1. WHERE THE EQUITY OF REDEMPTION IN LAND SOLD UNDER EXECUTION has been levied on and sold, neither the execution defendant nor the purchaser of the equity can redeem after the expiration of a year *from the date of the first sale*. Therefore, where, at the expiration of the year, the equity has been levied on, but has not been sold, a court of equity can not thereafter subject the property because of the inability of the sheriff to sell, the subject of the levy being no longer in existence.
2. HUSBAND AND WIFE—WIFE'S EQUITY.—A married woman's interest in her father's personal estate, while still in the hands of his administrator, was attempted to be appropriated by her husband's cred-

Bethel, &c., v. Smith, &c.

itors. She applied to a court of equity to have it settled upon her. The amount was four or five hundred dollars, and the husband was insolvent. *Held*, that the wife was entitled to the relief sought.

MONTGOMERY & POSTEN FOR APPELLANTS.

Neither the execution defendant whose land has been sold under execution, nor the purchaser of his equity of redemption, can redeem after the expiration of a year from the date of the first sale; and, therefore, the equity can not be sold after that time, although levied on before the year expired. (General Statutes, chapter 38, article 12, sections 4 and 6.)

WILSON & HOBSON FOR APPELLEES.

Brief not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This is an attempt by the creditors of the husband of Mrs. Bethel to subject her estate to the payment of his debts. At the death of her father she became entitled to an estate of some value, and while her part of the personalty, or that to which she was entitled, was in the hands of her father's administrator, the creditors of the husband, by some arrangement with him, attempted to appropriate it to the payment of his debts. Before this was done, or whilst the personal representative of her father had it in his hands, she applied to a court of equity to have it settled upon her—the amount was four or five hundred dollars, and the husband insolvent. The Chancellor granted the relief sought, and of this the creditors of the husband complain. The facts stated being established by positive and uncontradicted proof, there is no room to question the right of a court of equity to secure this estate to the wife; and, without noticing the cross-appeal further, as this is the only error assigned, it is proper to consider the appeal of Mrs. Bethel, on which

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she maintains that her land and homestead had been subjected by the Chancellor to the payment in part of the husband's debts.

Her husband owned a small tract of land that had been sold under various executions against him, and, as he lived on the land at the time, there was set apart to him as a homestead seven acres of the land, including the dwelling. The sale failing to satisfy the executions in full, one of the execution creditors, whose debt existed prior to the homestead law, had the homestead levied on and sold to pay his debt. It was sold and the purchaser transferred his bid or claim to the wife of the debtor, who, out of her own means, paid off the debt. The land selling for less than two-thirds of its value, these creditors, who are appellees here, had these executions levied on the equity of redemption, insisting, and as the record shows, that it was subject to these debts, having been acquired by the husband after the debts originated.

The levy was made but a short time before the time for redemption expired, and no sale having been made, for the reason that the sheriff had no time to advertise the same, it is now maintained that a court of equity is invested with the power to grant the relief and subject the property to the payment of the debt, because of the inability of the sheriff to sell.

It is manifest that when the year expired from the first sale that the right of exemption had gone from the debtor, and if the debtor could not redeem, we are unable to see how the Chancellor, by reason of the

statute, or upon any equitable principle, could extend the time for redemption to the creditor, and at the same time withhold that right from the debtor.

The right to sell the equity of redemption is purely statutory, and when the year expires, although a levy has been made, the right of redemption, which was the subject of the levy, no longer exists.

Where there has been a sale of the land and the right of redemption exists, and that right is levied on and sold, the debtor must still redeem from both purchasers before he can re-invest himself with title or remove the liens, and this he must do before the expiration of the year from the date of the first sale. The purchaser of the right of redemption may, before the end of the year from the first sale, pay the prior purchaser his money, and will then be entitled to the land unless redeemed by the execution defendant within the year, not from the day the sale of the right to redeem is made, but from the date of the prior sale, from which the right of redemption originates. This is in substance the provision of the statutes, and the relief given in this case is an extension of the right to redeem to the creditor, which is not authorized by the letter or spirit of any of its provisions, and, in fact, is a sale of that which is not in being.

The judgment is therefore reversed, and cause remanded with directions to dismiss the petition. (General Statutes, chapter 38, sections 5 and 6 of article 12.)

Beaven v. Phillips.

CASE 15—PETITION ORDINARY—MAY 16.

Beaven v. Phillips.**APPEAL FROM MARION CIRCUIT COURT.**

1. AN ASSIGNMENT OF ERRORS which states that the court erred in the instructions it gave to the jury, and in refusing those asked by the appellant, is sufficient without specifying the instructions referred to.
2. A BILL OF EXCEPTIONS can not be regarded as stating the material facts which the evidence conduces to prove where it states merely that "the evidence in the case was conflicting and conduced to show the facts respectively claimed by the parties in the pleadings."
3. AN ALLEGED ERROR IN REFUSING INSTRUCTIONS can not be considered in the absence of the testimony.
4. IT IS NOT A GROUND FOR REVERSAL upon the appeal of the plaintiff, and in the absence of the testimony, that instructions given are erroneous when considered upon the pleadings, as the appellant may have failed to show that he was entitled to any relief.
5. AN ERROR IN OVERRULING A DEMURRER must be excepted to, to authorize a reversal therefor.
6. THE APPELLANT WAS NOT PREJUDICED by an order overruling his demurrer to an amended rejoinder, no instruction based upon the pleading having been given.

HILL & RIVES FOR APPELLANT.

(Brief does not discuss the questions of practice decided by the court.)

J. R. THOMAS ON SAME SIDE.

Brief not in record.

JOHN McCHORD FOR APPELLEE.

Appellant can not complain of the overruling of his demurrer to amended rejoinder, as no instruction was based upon that pleading. (Remainder of brief devoted to the discussion of the merits of the case.)

W. E. & S. A. RUSSELL ON SAME SIDE.

1. Error in giving and refusing instructions can not be considered, as the assignment of errors does not point out any instruction given or refused, but assigns, in general terms, error in giving and refusing instructions; nor does the bill of exceptions show that the instructions complained of were all the instructions given or refused in the case.

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2. The refusal to sustain the demurrer to the amended rejoinder is not a reversible error, because not made a ground for a new trial, and because no instruction was based upon the pleading.
(Remainder of brief discusses the merits of the case.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellant, Richard Beaven, was indicted upon the charge of obtaining goods upon false pretenses from Phillips & Bro., and after three juries had failed to agree the indictment was, for some reason not appearing, quashed; and the grand jury failing to find another indictment, he was discharged. He then brought this action for malicious prosecution against James G. Phillips, who was a member of the above-named firm.

The assignment of errors neither particularizes the instructions, to the giving of which the appellant objected, nor those asked by him, and refused; but the general assignment that the court erred in the instructions it gave to the jury, and in refusing those asked by the appellant, is sufficient to call the attention of this court to this alleged error, and a more strict construction of the rule would often result in injustice.

The defendant, by an amended rejoinder, alleged that the plaintiff had never paid for or returned the goods he had obtained from Phillips & Bro., and it is urged that the court erred in overruling a demurrer to it; but the appellant did not except to the ruling, and if he had, yet as no instruction based upon it was given, the action of the court, even if erroneous, was not prejudicial to him.

The court rejected all the instructions offered by

Beaven v. Phillips.

both parties, and gave five in lieu thereof. It is not necessary to review them, or those asked by appellant, in detail.

The bill of exceptions does not state the testimony, nor the facts which the testimony conduced to prove. It only says, that "the evidence in the case was conflicting, and conduced to show the facts respectively claimed by the parties in the pleadings."

The Code of Practice requires that the bill must state the material facts which the evidence conduces to prove, and that a party shall not state his evidence in his pleadings. He must state a cause of action or a ground of defense, but not a detail of the facts. Indeed, it may often be a matter of dispute as to what is really in issue under the pleadings, or what facts are therein stated.

In this instance the bill of exceptions can not, in our opinion, be regarded as stating the material facts which the testimony tended to show; to hold otherwise would countenance too loose a practice, and it, therefore, results that we can not say that the court erred in rejecting any or all of the instructions offered by the appellant, because, even granting that they were proper under the pleadings, yet, for aught shown, there may have been no testimony whatever to support them; and it also results that the instructions which were given can not be viewed by the light of the testimony, and they seem to be supported by the pleadings; but even if they were not, and were erroneous when considered upon the pleadings, yet we could not hold that the appellant was prejudiced thereby, because he was the plaintiff, and

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he may have utterly failed to show that he was entitled to any relief whatever.

Judgment affirmed.

CASE 16—PETITION EQUITY—MAY 21.

Gedge v. Shoenberger, &c.

APPEAL FROM KENTON CHANCERY COURT.

1. TO GIVE A LANDLORD'S LIEN SUPERIORITY over other liens he must assert it within ninety days from the time the rent *becomes due*, and not wait until ninety days after the end of the rental year, if the rent is, by contract, due before the end of the year.
2. A TENANT'S COVENANT TO PAY TAXES is construed as an agreement to pay them as a part of the rent, so as to give the landlord priority therefor.

COLLINS & FENLEY FOR APPELLANT.

1. The landlord's lien is superior only when he asserts it within ninety days after the rent *becomes due*. (General Statutes, chapter 66, article 2, sections 11, 12 and 13; Revised Statutes, volume 2, chapter 56, article 2, sections 14 and 15; English v. Duncan, 14 Bush, 378; Fisher v. Kollerts, 16 B. M., 406.)
2. The tenant's agreement to pay taxes can not be construed as an agreement to pay them *as rent*.

BENTON & BENTON FOR APPELLEE.

To the extent of one year's rent the landlord's lien is superior, provided he sue out his distress warrant within ninety days from the expiration of the rental year. (General Statutes, chapter 66, article 1, sections 12 and 13; Revised Statutes, chapter 56, article 2; Fisher v. Kollerts, 16 B. M., 398; Beckworth v. Bent., 10 B. M., 95; Williams v. Wood, 2 Met., 42.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

This is a contest for priority of lien between the owner of a mortgage given by a tenant upon property, which was at the time upon the rented premises, upon the one hand, and the landlords to whom

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rent is owing which accrued subsequent to the execution of the mortgage, upon the other.

To one of the landlords the rent was payable semi-annually, and to the other, quarterly; but, notwithstanding this fact, they insist that, under the statute, they have a superior lien for one year's rent, having sued out their distress warrants within ninety days from the expiration of the rental year; while the appellant contends that the priority only embraces any rent which became due within ninety days before the warrants were issued.

Section 12, chapter 56, of the General Statutes, says: "All valid liens upon the personal property of a lessee, assignee or under-tenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and upon property on which the landlord hath a superior lien for his rent, then, *to the extent* of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference and be first satisfied, *provided the same is sued out in ninety days from the time the rent was due.*"

The landlord's lien is a creature of the statute; its enforcement is by a summary proceeding; and we have neither the inclination nor the authority to extend it by construction. Prior to the passage of the statute the tenant could, during the tenancy, dispose of his property, and the purchaser could hold it in defiance of the landlord.

The statute *supra* gives to him a lien superior to that of all other persons, created while the property is on the leased premises, *to the extent* of one year's rent, "provided the same (distress warrant or attachment) is sued out in ninety days from the time the rent was *due*."

While other sections of the chapter tend to throw some doubt upon the question, yet the language of the one above quoted is plain and unambiguous, and forces the conclusion that, while it was the legislative intent to give the landlord a preference, yet that he must use diligence in the enforcement of his lien. It is evident from the entire statute that he may distrain for quarterly or other installments of the year's rent; thus section 10, speaking as between the landlord and tenant, says: "A distress warrant may issue, although the lease be not ended, *but only for rent then due*, and not after the lapse of six months from the time it was due;" and if a landlord sees proper to contract for the payment of his rent by the month or quarter, or semi-annually, then the statute requires him to assert his lien, in order to maintain its superiority over other liens, within ninety days from the time the rent becomes due, and not delay until ninety days after the end of the rental year.

If the Legislature had intended to give him the privilege of such delay the statute would doubtless have provided that he should distrain within ninety days after the expiration of the year, instead of ninety days after the rent becomes due.

The lease of the Fabian lot was "for the term of

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ten years from the first day of May, one thousand eight hundred and 'seventy-three, at the yearly rent or sum of one hundred and fifty dollars; also to pay all taxes and assessments during said term. Said rent to be paid in equal semi-annual payments."

This covenant to pay the taxes must, from the evident intention of the parties as shown by the lease, be regarded as an agreement to pay them as a part of the rent. While they are not expressly so named, yet the parties to the contract clearly so intended, and this is the necessary implication.

It results, therefore, that Fabian's trustee had priority for \$75 due November 1, 1879, with interest until paid; also for \$45.38, with interest from September 25, 1879, until paid, being the taxes for the year 1879, and for \$6.50 for the cost of the distress warrant which was sued out in October, 1879; and the Shoenbergers for \$50, due July 1, 1879; \$50 due October 1, 1879, with interest on each of said sums from the maturity thereof, and for \$10.73, being the cost of their two distress warrants, the first one having been sued out upon August 1, 1879; and the judgment of the Chancellor is reversed, and cause remanded with directions to render judgment and for further proceedings as herein indicated.

Barbour v. City of Louisville.

CASE 17—AGREED CASE—MAY 28.

Barbour v. City of Louisville.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. CONSTRUCTION OF STATUTES—FINES AND FORFEITURES IN CITY OF LOUISVILLE.—Where *particular* words of a statute are followed by those of a *general* character, the latter are to be restricted to objects of the same kind as those particularly mentioned.

"An act to amend the charter of the city of Louisville" provided for the imposition of a fine *by the city court* for any injury done to any of the public ways in the city, and provided further, that "all such fines, as well as the fines for all other misdemeanors committed in the city of Louisville," should, when collected, be paid into the treasury of the city. *Held*—That the general words refer to fines imposed by the *city court* for offenses other than injuries to the public ways, and not to fines imposed by the circuit court.

2. A LAW IS TO BE CONSTRUED in the light of the settled policy of the State with reference to the subject-matter as indicated by previous legislation.
3. CONTEMPORANEOUS CONSTRUCTION by those procuring an act is to be regarded in construing it.
4. THE SPIRIT OF THE LAW and not the letter must control in its construction.

HELM & BRUCE, BROWN, HUMPHREY & DAVIE FOR APPELLANT.

1. The settled policy of the State has never authorized, nor has any legislative act ever authorized, fines and forfeitures of the circuit court to be given to the city of Louisville. (1 Morehead & Brown's Stats., pages 718, 719; 2 Morehead & Brown, pages 1118, 1417; Acts of 1827-8, page 208, and Elliott's Charter and Ordinances of Louisville, page 33; Acts of 1832-8, page 211, and Elliott's Laws and Ordinances, page 60; Acts of 1829-30, page 262, and Elliott's Charter and Ordinances, page 82; Acts of 1835-6, page 280, and Elliott's Charter and Ordinances, page 63; Acts of 1837-8, and Elliott's Charter and Ordinances, page 79; Loughborough's Digest of Statutes, pages 363, 528; 1 Revised Statutes, chapter 28, section 24; 2 Revised Statutes, sections 1, 5, 11, of article 6, chapter 55; General Statutes, pages 321, 578, 579, 580; Acts of 1850-51, volume 2, page 597, and Elliott's Charter and Ordinances, page 359; Elliott's Charter and Ordinances, pages 376, 378, 379-80; 2 Revised Statutes (Stanton's ed.), pages 530-8, and Acts of 1857-8, volume 1, page 76; Elliott's

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- Charter and Ordinances, pages 181, 260, 342; Acts, 1869-70, volume 2, page 30, and Lucas' Charter and Ordinances, page 5; Acts of 1876, volume 1, page 19, and General Statutes (Bullitt and Feland's edition of 1881), pages 888-4.)
2. As the "settled policy of the State" almost from its beginning has been that the fines and forfeitures earned by the circuit courts shall be paid to the trustee of the jury fund, an ambiguous expression in a "local and private" act should not be construed as working a sudden and radical change in that policy.
 3. By the ordinary canons for construction of statutes, the act of March 29, 1882, can not be held to give to the city of Louisville the fines and forfeitures realized from the circuit court.
 - a. One of the rules for construing statutes is, that where particular words of a statute are followed by general words, the general words are to be restricted and confined to objects of the same character and kind as those specified. (Sedgwick on Statutory Construction, page 360, note *Id.*, page 361; Bishop on Written Laws, section 245; McDade v. People, 29 Mich., 52; Hermance v. Board of Supervisors, 71 N. Y., 487; Kennedy v. Foster, 14 Bush, 482.)
 - b. Another rule of statutory construction is, that it is not the *letter* of the statute, but the *spirit* of it that prevails. (Mason v. Rogers, 4 Littell, 377; Phillips v. Pope's Heirs, 10 B. M., 172; Bailey v. Commonwealth, 11 Bush, 688; Brown v. Thompson, 14 Bush, 538; Brewer v. Blougher, 14 Peters, 198; United States v. Kirby, 7 Wall., 483; Bullard v. Bank, 18 Wall., 589.)
 - c. Another canon of construction is, that implied repeals are not favored. (Taylor v. Shields, 5 Litt., 297; E. & P. R. R. v. Trustees of Elizabethtown, 12 Bush, 237; Commonwealth v. Weller, 14 Bush, 224; 112 U. S., 549.)
 - d. Another rule of construction is, to adopt the contemporaneous construction put upon the act by those who procured it and who were to execute it. (Collins v. Henderson, 11 Bush, 75; Sedgwick on Statutory Construction, page 213; *Idem.*, Pomeroy's note, page 227; Chicago v. Sheldon, 9 Wall., 54; Commercial Bank v. City of New Orleans, 17 La. Ann., 190; United States v. Pugh, 99 U. S., 269; United States v. Moore, 95 U. S., 763.)
 4. If the act of 1882 means what the court below has decided it means, it is unconstitutional and void, because it relates to a subject not expressed in the title. (Pennington v. Woolfolk, 79 Ky., 20; Cutlett v. The Sheriff, 3 W. Va., 588; People v. Hill, 35 N. Y., 435; Grubbs v. State, 24 Ind., 297; Childs v. Monroe, 4 Met., 75; O'Donohue v. Aiken, 2 Duv., 478; Rushing v. Siebree, 12 Bush, 199; Jones v. Thompson, 12 Bush, 394; Hedges v. Rennaker, 3 Met., 267; Hinds v. Rice, 10 Bush, 528; Fuqua v. Mullen, 18 Bush, 470.)
 5. That construction should be put upon the act which would prevent it

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from being of doubtful constitutionality. (Waller v. Martin, 17 B. M., 181.)

6. The sheriff was but the fiscal agent of the Commonwealth in collecting the fines and forfeitures and paying them over to the State's trustee of the jury fund, and being merely an agent and having paid over the money to the principal, or in obedience to the order of the principal, before suit was brought, he is not liable. (Webb v. MacAuley, 4 Bush, 12; Divine v. Harvie, 7 Mon., 439; Story on Agency, section 300; Commissioners v. Theobald, 17 B. M., 481.)

T. L. BURNETT FOR APPELLEE.

1. "An act to amend the charter of the city of Louisville" is a title broad enough to admit of a provision in the act that fines collected for misdemeanors committed in the city shall be paid into the treasury of the city.
2. The history of legislation as to the fines collected for misdemeanors committed in the city of Louisville, shows that it was intended by the Act of 1882 that such fines should be paid into the treasury of the city. (Elliott's Laws and Ordinances, 46, 60, 61; section 9, article 5, charter of 1851; sections 42 and 59, charter of 1870.)
3. There are other rules for the construction of statutes of equal dignity and importance with the rule of "*ejusdem generis*," and that rule can not be applied if its application requires that all the other rules of construction be disregarded. (Bailey v. Commonwealth, 11 Bush, 688, 691.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The claim of the city of Louisville to the fines imposed by the Jefferson circuit court in misdemeanor cases arising within the city limits is based upon a legislative act, approved March 29, 1882, entitled "An act to amend the charter of the city of Louisville," and the fourth section of which reads thus:

"4. It shall be competent for the said city to institute or maintain an action for injury or damage done to any of the public ways in said city, and in addition thereto the person so injuring or damaging such public way shall be liable to a fine of not less than fifty dollars or more than one hundred dollars, and, on conviction thereof, in the city court of said city,

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shall be confined in the work-house of said city until such fine and the cost shall be paid by work at the rate of fifty cents per day, unless such fine and cost be replevied or otherwise paid; and all such fines, as well as the fines for all other misdemeanors committed in the city of Louisville, shall, when collected, be paid into the treasury of said city, and be subject to appropriation by the general council of said city."

It is urged upon the part of the city that the words, "and all such fines, *as well as the fines for all other misdemeanors committed in the city of Louisville*," show unequivocally that the fines and forfeitures of the *circuit* court in such cases belong to it; also, that it has been the settled policy of the State for many years to give to the city the fines for misdemeanors committed within its limits, whether imposed by the *circuit* or its *city* court. Upon the part of the State, however, it is claimed that its policy has been the reverse as to the judgments of the first-named court; and a brief review of it will serve to some extent as a guide to the proper construction of the law.

The first general law in this State (1 M. & B., 718) as to fines, provided that they should be applied in the same way as the county levies; and they were used to pay the expenses of the county, which included the costs arising from the holding of its *circuit* court.

By the act of February 14, 1820, fines imposed by the circuit court of a county were given to the public schools of the *Commonwealth* within such county, and not to any city in it. The first charter of the city of Louisville did not give to it the fines imposed by the

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circuit court for offenses committed within the corporate limits, but only those of its mayor's court.

By the act of February 13, 1833, fines assessed by the circuit court for misdemeanors committed within the city were given, not to the city generally, but to its public schools; and this was done because by said act a part of the *State's* public school system became public city schools, and the *State's* public school system in the city received the money. The act of February 22, 1836, establishing the police court of the city, provided that the fines recovered in favor of the Commonwealth in said court should be for the benefit of the public schools of the city; and in consideration thereof the city was annually to pay into the Treasury of the *Commonwealth* "\$1,200, in addition to the sum heretofore directed to be paid;" and by its charter of 1851, it was for the same consideration "to pay into the Treasury of this *Commonwealth* the like sum of \$1,500." In 1838, the mode of supporting the common schools was changed from the precarious one of fines to that of taxation; and the law was then altered so that the trustee of the jury fund of the circuit court received the fines imposed by it, they to be applied by him in paying the expenses of holding the court; and from that time until this action was brought, save a portion of said period when the city court had exclusive jurisdiction of such cases, the fines imposed by the *Jefferson circuit* court for offenses committed within the city limits of Louisville have been paid, not to the city, but into the State Treasury or to the trustee of the jury fund: and by law any balance in his

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hands had to be paid to the *State* Treasurer by the first of January in each year.

The legislation upon the subject indicates that it has been the purpose and policy of the State to reserve to itself the fines and forfeitures of the Jefferson circuit court, to aid in the expense of holding it; and in the light of this policy we must examine the law now in question.

It is a rule of construction, that where *particular* words of a statute are followed by those of a *general* character, the latter are to be restricted to the objects particularly mentioned. If the act begins with words which speak of things or persons of an inferior degree and concludes with general words, the latter are not to be extended to anything or person of a higher degree. If a particular class is mentioned and general words follow, they must be treated as referring to matters of the same kind, thus subordinating general terms to the preceding particulars.

It is said in Sedgwick on Statutory Construction, page 361: "Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned. So a statute treating of persons or things of an inferior rank can not, by general words, be extended to those of a superior rank."

The "*particular*" words in the act of 1882 relate to fines by the *city* court for injuries to the public ways of the city, and if not paid the offenders are to be confined in the city work-house; and if the words "as well as the fines for all other misdemean-

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ors committed in the city of Louisville," include fines imposed by the circuit court, then the "*general*" words of the act must be held to relate to those inflicted by a superior court, and the punishment of which reaches higher than confinement in the city work-house; and the rule that the general words must be held to relate to things *ejusdem generis* is violated.

It is noticeable that the act is a *local* one; that it does not in terms relate to the *circuit* court; that it is an amendment to a charter, which, so far as it relates to fines, speaks only of those imposed by the *city* court; that it contains no repealing clause, and does not purport to repeal the general law, which provides that the fines of the circuit court shall be paid to the trustee of the jury fund. The latter court represents the State, and the city court, the city; and the fines imposed by the former naturally should aid in its support, or go to the State. If the construction contended for by the city is correct, then it follows that the State, or, in other words, the other counties, must, by taxation, support the circuit court of Jefferson county, while the city of Louisville gets the benefit of the fines imposed by that court. It should not be presumed that such partial legislation was intended, or a repeal by implication of the general law; and it does not seem to us, since repeals by implication are not favored, that such a construction should be given to the ambiguous words of a local statute as to produce such a result; but that the words "as well as the fines for all other misdemeanors committed in the city

Barbour v. City of Louisville.

of Louisville," refer to fines imposed by the *city* court for other offenses than injuries to its public ways.

It is said, that if this be so, then the words are superfluous, because such fines, by the law already in force, belonged to the city; but an examination shows that they did not go generally into the city treasury, and were not subject to general appropriation by the general council of the city, as is the case by the act now under consideration, and that their use was, at least to some extent, limited; and this fact is to us a conclusive reason why all the fines imposed by the city court were present in the legislative mind, and were mentioned in this act.

The fines of the Jefferson circuit court amount annually to thousands of dollars. This act became operative on March 29, 1882, and yet the city never asserted claim to them until 1885. Contemporaneous construction by those procuring an act is to be regarded—*contemporanea expositis est fortissima in lege*; and usage under a law, by those claiming a right under it, is often a safe interpreter.

It is said in Pomeroy's note to Sedgwick, p. 227:

"The practical construction given to the statute by the public officers of the State, and acted upon by the people thereof, is to be considered, and is, perhaps, decisive, in cases of doubt;" and in the *United States v. Pugh* (99 U. S., 269) the Supreme Court say:

"It is a familiar rule of interpretation, that in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been

called upon to carry it into effect is entitled to great respect."

Again, in the *United States v. Moore* (95 U. S., 763), the same court say :

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not infrequently they are draftsmen of the laws they are afterwards called upon to interpret."

Even if the letter of the law upon proper construction were opposed to the conclusion we have reached, yet it should not be permitted to kill the spirit of it; the *will* of the Legislature, and not the *words* used by it, must control; and we think there is no room to doubt but that the legislative intent in enacting the fourth section *supra* was to legislate only as to fines imposed by the city court of Louisville; and any other construction of it would render its constitutionality at least questionable under that provision of our Constitution which provides that no law shall relate to more than one subject, and that shall be expressed in the title.

Judgment reversed, with directions to dismiss the action.

Smith v. Western Union Telegraph Co.

CASE 18—PETITION ORDINARY—MAY 28.

Smith v. Western Union Telegraph Co.

APPEAL FROM HENRY CIRCUIT COURT.

1. TELEGRAPH COMPANIES can not, by contract, relieve themselves from liability for their *negligence* in failing to deliver messages.
2. DAMAGES—FAILURE TO DELIVER TELEGRAM.—The damages which may be recovered for the breach of a contract are such only as the parties may fairly be *supposed* to have considered, or at least would have considered as flowing from a breach of the contract if they had been informed of all the facts.

Appellant made a deposit with stock-brokers in the city of New York to secure them in whatever sum they might expend for stocks which they were authorized to purchase for him. They were not to sell the stock purchased, except in the event it so declined in value that its value, with the deposit made by appellant, did not equal the amount paid therefor. A half-rate telegram was addressed to appellant at Eminence, Kentucky, by his agents, notifying him of a purchase of stocks, several purchases having previously been made for him, of which he had notice. The telegram was received by the operator at Eminence, but never delivered. Appellant's stocks declining so that their value, together with his deposit, was less than the amount paid for them, appellant's agents sold. Soon thereafter there was a reaction and the stocks increased very much in value. In this action against the telegraph company the jury find that if appellant had received the telegram he would have ordered his stock, or a part of it, sold when stocks first began to decline, of which he had notice, and thus have saved \$5,800 of his deposit.

Held—That the consequences which resulted to appellant were not the ordinary result of the failure to deliver the message, and, hence, can not be supposed to have been contemplated when the company undertook to transmit it; and that the appellant can, therefore, recover only the cost of the message.

3. SPECIAL VERDICTS.—What a person *might* or *would* have done in a certain event is not the proper subject of a special finding, and such a finding, although not objected to, will not be considered.

W. LINDSAY FOR APPELLANT.

1. A telegraph company can not restrict its liability for loss resulting from its *negligence* in failing to deliver messages. (*Camp v. Western Union Telegraph Co.*, 1 Met., 164; *U. S. Telegraph Co. v.*

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- Wenger, 55 Pa. St., 262; U. S. Telegraph Co. v. Gildersleeve, 29 Md., 282; Ritterhouse v. M. L. of Lee, 44 N. Y., 263; Thompson on Negligence, volume 2, page 857; Sherman & Redfield on Negligence (3d ed.), section 571; Griswold v. Dunham, 12 Reporter, page 25; General Statutes, chapter 29, article 14, section 10.)
2. In cases of injury to or loss of *existing* property owned by the plaintiff, the damages can be ascertained with reasonable accuracy, and the question in such cases is, whether they arise out of the breach of contract, and are to be reasonably traced to it, as the moving cause. The doctrine of Hadley v. Baxendale, 9 Exch., 341, does not apply to such cases, although often so misapplied. (Wilson v. Newport Dock Company, C. L. Reports, 1 Ex., 188.)
 3. It is to be assumed that appellant's agents would have obeyed an order to sell. (U. S. Tel. Co. v. Wenger, 55 Pa. St., 262; Tyler v. W. U. Tel. Co., 60 Ill., 421; W. U. Tel. Co. v. Bertram, Reporter, volume 12, page 798; Ritterhouse v. Tel. Co., 44 N. Y., 263.) And it may also be assumed that appellant would have ordered a sale if he had received the telegram; but if not, that was a question of fact for the jury, and its finding is conclusive. (Denny v. Flitner, 118 Mass., 181; Goodloe v. Rodgers, 10 La. Ann., 631; Calvin v. McFadden, 13 Dr., 324; 81 Vt., 540; Dewitt v. Wietre, 9 Wend., 325; Davis v. Garrett, 6 Bing., 716.)
 4. Orders to agents to buy or sell stock impart sufficient information of their importance to render the telegraph company liable for the consequence of its neglect in their transmission or delivery. (U. S. Tel. Co. v. Wenger, 55 Pa. St., 262; Tyler v. W. U. Tel. Co., 60 Ill., 421; Ritterhouse v. Tel. Co., 44 N. Y., 263.)
 5. In case of a breach of contract, the party in default, having notice of the importance in general of the prompt performance of contracts of like nature, is to be taken to have contemplated all the consequences that would reasonably have been apparent to him, if he had known all the facts which he might have learned, by inquiry made at the time, of the person with whom he negotiated the agreement. (Leonard v. N. Y. Tel. Co., 41 N. Y., 54; West. Un. Tel. Co. v. Bertram, 12 Reporter, page 798.) In petition for rehearing counsel upon this point cited also: Sutherland on Damages, volume 3, page 811; Carroll v. W. U. Tel. Co., 34 Wis., 471.)
 6. As to what appellant *might* or *would* have done being a question of fact for the jury, counsel cited in petition for rehearing: E. & P. R. R. Co. v. Pottinger & Bro., 10 Bush, 185; U. S. v. Behan, 110 U. S., 388.

HARGIS & CALDWELL ON SAME SIDE.

1. The measure of damages for breach of contract is such as may, fairly and substantially, be considered as arising naturally from the breach, or for whatever damages may fairly be supposed to:

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have been within the contemplation of the parties, had they known at the time of the contract the facts affecting it which subsequently transpired. (*Gee v. Lancashire and Yorkshire Railway*, 6 H. & N., 210; *Griffin v. Colver*, 16 N. Y., 489; *Jones and Jarnagan on Law of Telegraphs*, section 390, page 390; *Sedgwick on Damages*, page 77; *Redfield on Carriers*, chapter: "Telegraph Companies.")

2. The jury have ascertained the damages, which are such as the parties ought reasonably to have expected would flow from the failure to deliver the dispatch when the company agreed to deliver it.

CARROLL & BARBOUR FOR APPELLEE.

What appellant would have done had he received the telegram is mere conjecture, and, therefore, the damages claimed for the failure to deliver it are too remote and uncertain to be the subject of recovery. A party who has failed to fulfill a contract can not be held liable for such remote, contingent and uncertain consequences. (*Landsberger v. Magnetic Telegraph Co.*, *Allen's Telegraph Cases*, 165; *Squire v. W. U. Tel. Co.*, *Ibid.*, 377; *Shields v. Washington Tel. Co.*, *Ibid.*, 5; *Lane v. Montreal Tel. Co.*, *Ibid.*, 64; *Stevenson v. Montreal Tel. Co.*, *Ibid.*, 88; *U. S. Tel. Co.*, *Ibid.*, 390; *Baldwin v. U. S. Tel. Co.*, *Ibid.*, 614; *McCall v. Tel. Co.*, *Abbott's New Cases*, 151; *Lowery v. Tel. Co.*, 60 N. Y., 198.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

About November 14, 1879, the appellant, Z. F. Smith, employed Manuel & Co., who were stock-brokers in the city of New York, to purchase stocks for him for speculation. To secure them in whatever sum they might thus expend, he deposited with them, in cash and bonds, about \$17,000. They had a general discretionary power from him to purchase, save they were not to buy more than seventeen hundred shares, and were not to sell it except upon his order, or in the event the stock they might purchase so declined in value that it, with the money deposited with them by the appellant, did not equal the amount paid by them for the stock. Prior to November 18, 1879, they had purchased for him eleven hundred shares of railway

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stocks, but had not notified him of the purchase of the last four hundred of them. Upon the last-named day they bought four hundred more, and late in the afternoon of that day they delivered to the appellee's operator, in the city of New York, the following half-rate or night telegram, to be sent to the appellant at Eminence, Ky., where he then lived, and which, by the usual course of such business, ought to have been received by him by 9 o'clock the next morning:

“NOVEMBER 18, 1879.

“To Z. F. SMITH,

“*Eminence, Henry county, Ky.:*

“Bought two Erie, six three-quarters; two Michigan, six one-quarter—will hold notice here.

“HORACE MANUEL & Co.”

It was received by the operator at Eminence, but never delivered to the appellant. He relied for information as to the condition of the New York stock market upon the daily report of it published in the daily Louisville Courier-Journal, a reliable newspaper published in the city of Louisville, and which he received each day before 8 o'clock in the morning. From it he learned, and it was true, that stocks began to decline on November 18, 1879, and there were then signs of a panic near at hand. This decline continued until November 21, 1879, when it was the greatest, and which day was known as “black Friday.” The appellant was daily apprised of what was occurring by his newspaper, but in ignorance of the amount of stock that had been purchased for him. He could have sold all

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of it, however, on November 19th, at a loss of not over one thousand, and on the 20th of not over four thousand dollars. Upon the 21st, however, it had so declined that its then value, together with the deposit of the appellant, did not equal what the brokers had paid for it; and they thereupon sold it for a sum which, with the deposit, did not repay them what they had paid out for the appellant, and thus left him in debt to them. In a few days after the sale a reaction in stocks occurred, and by November 28th the stocks sold from the appellant were selling for more than he had paid for them. He brought this action against the telegraph company for damages for failing to deliver the above dispatch, and says, that if he had received it, and thus been informed of the last purchase of stock, he would have kept his "margin" good, and thus saved all his stock; that his deposit was sufficient to have "tided him over the flood," but for this last purchase; and if he had known of it, that, as a reasonable man, he would have covered the decline by an increase of his deposit or sold enough of the stock to have protected the remainder, or have ordered it all sold at the beginning of the decline, and thus have substantially saved himself.

The appellee relies mainly upon two defenses: first, that it is protected from liability by the printed terms and notice upon the form used and accepted by Manuel & Co., upon which they wrote the message; and second, that the alleged damages were not proximate, but too remote to authorize a recovery.

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The jury returned the following special findings:

1st. Was the message from Horace Manuel & Co., dated November 18, 1879, delivered to the plaintiff, Z. F. Smith; if so, in what way, and when?

Answer. It was not.

2d. Did the plaintiff, Smith, prior to November 19, 1879, direct the defendant's agent at Eminence not to send his messages to him, but to keep them at his office till he, Smith, called for them?

Answer. He did not.

3d. Was the stock, mentioned in the telegram of the 18th of November, 1879, purchased in New York in obedience to the orders sent them on that day, or at any time previous thereto, by plaintiff?

Answer. It was.

4th. If Smith instructed his brokers to buy said stock by telegram, what was the date of the telegram, and what was its contents?

Answer. By telegram, dated 18th of November, 1879, as follows: "Buy up to amount ordered sold, best advantage, at discretion."

5th. Could Smith, by the use of ordinary diligence, have learned of the purchase on the 18th of November, 1879, independent of the telegram of that date, at any time before Friday, November 21, 1879?

Answer. He could not.

6th. Was the nature of said telegram, and the importance of its prompt delivery, communicated to defendant's agent at New York?

Answer. It was not.

7th. Did the defendant's agents at New York and

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Eminence, or either of them, understand the nature of said telegram from its language?

Answer. They did.

9th. If the jury shall find that the telegram of the 18th of November, 1879, was not received by Smith, then they will say whether, if it had been received by him, he would have ordered his stock, or any part of it, to be sold, either on the 19th or 20th days of November, 1879?

Answer. He would.

10th. If the foregoing question is answered in the affirmative, then the jury will say whether Smith would have saved any part of his deposit in New York; and if so, how much in value?

Answer. \$5,800, five thousand eight hundred dollars.

11th. Was there a decline in the value of the stock held by Smith's brokers in New York, between the morning of the 19th and the morning of the 21st of November, 1879, equal to ten per cent. of the face value of said stock?

Answer. There was.

12th. If there was such decline, the jury will say whether Smith's brokers had the right to sell said stock?

Answer. They had.

13th. Were Smith's brokers authorized by him to sell any of his stocks on the 18th of November, 1879?

Answer. They were not.

14th. If they were so authorized, how, and in what way, did they receive their authority, and what was it?

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Answer. None at all.

A new trial was not asked by either party, nor did either of them object to the form of the interrogatories or the answers, and they must, therefore, be taken as true. The appellant asked a judgment upon the findings for \$5,800 in damages, while the appellee objected to it, and moved the court to render one for nominal damages only. The motion of the former was overruled and a judgment rendered for eighty-five cents, the cost of the dispatch; and to reverse so much of the final order as overruled the appellant's motion for a judgment for \$5,800 in damages, this appeal is prosecuted.

The printed part of the form used in sending the telegram reads thus:

“BLANK No. 45.

“THE WESTERN UNION TELEGRAPH COMPANY.

“HALF-RATE MESSAGE.

“The business of telegraphing is liable to errors and delays, arising from causes which can not, at all times, be guarded against, including, sometimes, negligence of servants and agents, whom it is necessary to employ; most errors and delays may be prevented by repetition, for which, during the day, half price extra is charged, in addition to full tariff rates. The Western Union Telegraph Company will receive messages for transmission between certain authorized stations on its line, east of the Rocky mountains, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at one-half of the usual day

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rates; but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery for such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission; and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message. ———. Send the following message subject to the above terms, which are agreed to."

A few cases are to be found in which it has been held that telegraph companies are to be regarded as common carriers; but the later current of authority is not in this direction, and properly so, because the *transmission* of messages is necessarily subject to the risk of mistake and interruption. The wire is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice and climatic influence when the company has not the actual, immediate custody of the message, as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer. (Western Union Telegraph Co. v. Blanchard, 45 Am. Reps., page 480, and cases there cited.)

It is, however, a public agent; it exercises a *quasi* public employment: carefulness and fidelity are essentials to its character as a public servant,

and public policy forbids that it should abdicate as to the public by a contract with the individual. He is but one of millions; his business will, perhaps, not admit of delay or contest in the courts, and he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect.

Its liability for neglect is not founded purely upon contract. It is chartered for public purposes; extraordinary powers are, therefore, conferred upon it; it has the power of eminent domain; if it did not serve the public it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect, independent of any express contract. The public are compelled to rely absolutely upon the care and diligence of the company in the transaction of this business, so wonderful in its growth, so necessary to the life of commerce and useful beyond estimate; and if it relies upon a notice or contract to restrict its liability, it must be one not in violation of public policy; and in view of the vast interests committed to a telegraph company, the extraordinary powers given it, and the virtual monopoly it almost necessarily enjoys, the court should compel it *nolens volens* to perform the corresponding duties of diligence and good faith to the public, thereby created.

Any other rule would defeat the very purposes for

which these companies are chartered, to wit: the safe and speedy transmission of messages for the public; and while they may reasonably restrict their liability, yet they can not do so as against their own negligence. They undertake to exercise a public employment, which, in many respects, is analogous to that of a common carrier, and they must, therefore, bring to it that degree of skill and care which a prudent man would, under the circumstances, exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-use, is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power, and leave the public comparatively remediless. (W. U. T. Co. v. Fontaine, 58 Ga., 433; Wolf v. Western, etc., 62 Pa., 83; Sweetland v. Illinois, etc., 27 Iowa, 432; Breese v. U. S., etc., 48 N. Y., 132; U. S. T. Co. v. Gildersleeve, 29 Md., 232; West. Union v. Buchanan, 35 Ind., 429; Hibbard v. Western Union, 33 Wis., 558; Telegraph Co. v. Griswold, 37 Ohio, 301; Tyler v. West. Union, etc., 60 Ill., 421; Ellis v. The American T. Co., 13 Allen, 234.)

In this instance the failure did not arise in the *transmission* of the message, or from any cause not within the appellee's control, but from neglecting to deliver it.

We now turn to the question, whether the appellant's damages are so far removed from the failure of the appellee to perform its duty as to forbid their recovery? The line between proximate and re-

mote damages is exceedingly shadowy; so much so, that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect.

The law does not undertake to charge a person with all the *possible* consequences of a wrongful act, but only with its probable and natural result; otherwise the punishment would often be entirely disproportioned to the wrong, thereby impeding commerce and the ordinary business of life, and rendering the rule impracticable.

Although the damages may arise remotely out of the cause of action, or be, to some extent, connected with it, yet if they do not flow naturally from it, or could not, in the ordinary course of events, have been expected to arise from it, they are not, in a legal sense, sufficiently proximate to authorize a recovery, and the rule, which is common to both the common and civil law, *causa proxima non remota spectatur*, applies. They need not be the *immediate* result of it—intervening events or agencies may contribute to the injury—but they must be certain in their nature and cause, and, as Mr. Greenleaf says, “be the *natural and proximate* consequence of the act complained of.” (2 Greenleaf on Evi., page 210.)

It is not sufficient that they may be merely a possible result, traceable to the cause the complaining party may assign; but they must be such as, according to the usual and natural course of things, can be considered as fairly and substantially arising from

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it; otherwise, they are not its natural incidents, and can not be considered to have been within the contemplation of the parties when the contract was made.

It is not required that they *must* then have considered them; but they must be such as the parties may fairly be *supposed* to have considered, or at least would have considered as flowing from a breach of the contract if they had then been informed of all the facts. It was said in *Leonard v. Tel. Co.*, 41 N. Y., 544, that "a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts."

This is substantially the rule laid down in the leading case upon this question, of *Hadley v. Baxendale*, 9 Exch., 341, and which has been generally followed, both in England and this country. Applying this rule to the case in hand, it does not seem to us that the appellant has brought his case within it.

It is true that the dispatch showed upon its face that it related to a business transaction; and the jury found, as a fact, that the appellee's agents understood it; but the injury did not arise naturally from its non-delivery; and, from the wording of it, it is impossible to suppose that the parties, when it was received for transmission, could have contemplated the injury now complained of, if they had then looked to its non-delivery. It merely apprised

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the appellant that his agent had purchased for him a certain amount of stock. The appellee did not know from it, or in any way, the purpose to be accomplished or that the appellant already owned other stock, or that a knowledge of its contents was necessary to his conduct in keeping a sufficient "margin" with his broker to prevent a loss, or to guide him as to a sale of his stock. There was an intervening step. If the dispatch had been received, then he might or might not have taken it and acted. It rested altogether with him, and is unlike the case of an agent, who is ordered by a telegram to do a certain act, but which, by reason of its non-delivery, he does not do, thereby entailing a loss upon his principal. It does not naturally follow that the appellant would have been any better off now if he had received it. As well might A claim the stakes in a race from a railroad company, that, by a delay of its train, has prevented his horse from arriving at the race in time to take part in it, although, if there, he might have been beaten; or a prize offered for the best model of a machine, to be exhibited at a certain place by a certain day, because, by a delay in carrying it, his model did not arrive in time to be exhibited. The consequence which resulted to the appellant was not the ordinary result of the failure to deliver the message in question, and hence can not be supposed to have been in contemplation when the company undertook to transmit it. If the minds of the contracting parties had, at the time, been drawn to the contingency of a failure of performance, they could not

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possibly, from the nature of the dispatch, have contemplated the loss of which the appellant now complains; and in such a case the company is only liable for nominal damages for its default. (Behm v. West. Union, 8 Biss., 131; Lowery v. Same, 60 N. Y., 198; Tel. Co. v. Gildersleeve, 29 Md., 232; Graham v. Tel. Co., 10 Am. Law Reg., 319; Bank v. Same, 30 Ohio, 555; Landsberger v. Same, 32 Barb., 530.)

It is urged, however, that the jury, by the answer to the ninth interrogatory, found that if the appellant had received the telegram, that he *would* have ordered his stock sold; and that, as this finding was not objected to, it is, therefore, conclusively shown that the loss would not have occurred if the message had been delivered. In our opinion, what the appellant *might* or *would* have done, could not be the subject of a special finding. It was not a matter of fact, and the appellee was not, therefore, bound to object to it; and it does not follow, therefore, that it is conclusively shown that the loss was the direct result of the appellee's failure to deliver the message.

Judgment affirmed.

Kentucky Central R. R. Co. v. Gastineau's Adm'r.

CASE 19—PETITION ORDINARY—JUNE 8.

Kentucky Central R. R. Co. v. Gastineau's
Adm'r.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

- ✓ 1. TRESPASSERS UPON THE YARD OR TRACK OF A RAILROAD COMPANY can not recover of the company for injury unless it was wantonly inflicted after the danger was discovered.
2. RAILROADS—DUTY TO ONE ASSISTING EMPLOYEE.—One who undertakes to assist an employe of a railroad company, at the request of the employe, does not thereby place himself within the protection of the company so that it is bound to anticipate and ascertain if he has placed himself in danger, unless the employe has express authority from the company to make the request, or occupies such a position toward the company and the act to be done, that the authority can be fairly implied.
3. RIGHTS OF TRESPASSING CHILDREN.—One is bound to exercise reasonable care to *anticipate* and prevent injury to a child of such tender years as to have little or no discretion, although the child be a trespasser.
In this case it was a question for the jury whether a boy about fourteen years of age, killed while uncoupling cars, from his age and experience, had discretion sufficient to recognize his danger and guard against it. If he had, being a trespasser, the company was not bound to *anticipate* and provide against peril to him.
4. PUNITIVE DAMAGES.—It was error to instruct the jury that if the defendant was guilty of willful neglect they "*ought*" to award punitive damages. Nor was the error cured by telling them in another instruction that they "*could*" find any sum as punitive damages not exceeding the amount claimed in the petition.
- ✓ 5. WILLFUL NEGLIGENCE is an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury.
6. IN FIXING COMPENSATORY DAMAGES for loss of life the inquiry should be limited to the power of the deceased to earn money, had he not been killed, and the jury should not be directed to inquire as to the "*value*" of that power.

BRECKINRIDGE & SHELBY FOR APPELLANT.

1. Where a stranger comes upon ground to which the right of a railroad company is exclusive, and voluntarily assists its employes in

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85	228
83	119
89	234
83	119
96	108

83	119
104	614

83	119
108	130

83	119
111	711

83	119
117	299
117	776

83	119
126	620

83	119
135	809

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- the performance of a dangerous work, the company is not liable for an injury resulting to him from the negligence of its employes, unless, perhaps, the negligence be "willful," and be after the discovery of his danger. (Flower v. Penn. R. R. Co., 69 Pa. St., 210, 8 Amer. Rep., 251; New Orleans, etc., R. R. Co. v. Harrison, 48 Miss., 112, 12 Amer. Rep., 356; Canley v. Pittsburg, etc., Ry. Co., 96 Pa. St., 398, 40 Amer. Rep., 664; Sherman v. Hannibal, etc., R. R. Co., 72 Mo., 62; Everhart v. Terre Haute, etc., R. R. Co., 78 Ind., 292, 41 Amer. Rep., 567; 1 Addison on Torts, section 566; Mason v. Missouri Pacific Ry. Co., 27 Kans., 83, 41 Amer. Rep., 405; P. & R. R. Co. v. Hummell, 44 Pa. St., 375; Degg v. Midland R. R. Co., 1 Hurlst. & Norm., 773; Carter v. L. & N. R. R. Co., 4 Ky. Law Rep., 825; B. & O. R. R. Co. v. Schwindling, 22 Amer. Law Reg., 453; General Statutes, chapter 57, section 1.)
2. A person voluntarily assisting the employes of another in their work, sustains himself *quoad hoc*, the relation of servant to their employer, or at least a relation no more favorable than that of servant; and if the employer be a railroad company, it is, under our express statute law, not liable for the death of such volunteer, caused by the ordinary neglect of its employes. (General Statutes, chapter 57, section 1.)
 3. As to definition of "willful neglect," given by lower court. (L. & N. R. R. Co. v. Filbum's Adm'r, 6 Bush, 580; Board of Int. Imp. v. Scearce, 2 Duvall, 579; Jacobs v. L. & N. R. R., 10 Bush, 278.)
 4. As to definition of compensatory damages given by lower court. (L., C. & L. R. R. v. Case's Adm'r, 9 Bush, 787.)

HARGIS & EASTIN FOR APPELLEE.

1. A railroad company can not escape liability for injury to an infant of tender years, simply because the infant *voluntarily* placed himself in a perilous position. If the agents of the company knew of the peril and consented to it, that of itself was a continuing act of negligence, for which the company is liable. (L. & N. R. R. Co. v. Wolfe, 80 Ky., 85.)
2. The plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him. (Sherman & Redfield on Negligence, sections 36, 37; Lafayette, etc., R. R. Co. v. Adams, 26 Ind., 76; L. & N. R. R. Co. v. Collins, 2 Duv., 116; L. & N. R. R. Co. v. Sickings, 5 Bush, 4; L. & N. R. R. Co. v. Filbum, 6 Bush, 575; L. C. & L. R. R. Co. v. Mahoney, 7 Bush, 289; P. & M. R. R. Co. v. Hoehl, 12 Bush, 43.)
3. The instructions, when considered together, do not *require* the jury to give punitive damages, but if they do they are not *erroneous*,

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as the statute provides that the plaintiff in such actions "*shall have the right*" to recover *punitive* damages. (General Statutes, chapter 57, sections 1 and 3; L. & P. Canal Co. v. Murphy, 9 Bush, 526; Chiles v. Drake, 2 Met., 151.)

4. The definition of "willful neglect" is not objectionable. (Jacobs' Adm'r v. L. & N. R. R. Co., 10 Bush, 273; L. & N. R. R. Co. v. McCoy.)

BRONSTON & KINKEAD ON SAME SIDE.

1. As the act of appellant's servants, in permitting the boy to be about the cars, was a continuing act of negligence, they are to be held to have been aware of his danger from the time he was first seen upon the cars, or at least from the time he was ordered to couple them, and, therefore, it would not have been proper to instruct the jury that appellant must, after his negligence, have become aware of the danger and then have failed to use proper care. (L. & N. R. R. Co. v. Wolfe, 80 Ky., 85; Jacobs' Adm'r v. L. & N. R. R. Co., 10 Bush, 273.)
2. Willful neglect was properly defined. (Board of Int. Imp. Shelby Co. v. Scarce, 2 Duv., 576; City of Lexington v. Louis, 10 Bush, 680.)
3. As to compensatory damages. (Sedgwick on Measure of Damages, section 35; Parks v. Jenkins, 3 Bush, 587; Sherman & Redfield on Negligence, section 606; L. C. & L. R. R. Co. v. Case's Adm'r, 9 Bush, 736.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

Robert M. Gastineau, a boy between fourteen and fifteen years of age, was run over and killed by a car of the appellee, which he was endeavoring to uncouple from a train, while switching in the company's yard. In this action by his administrator for damages, the jury found a general verdict for five thousand dollars; and also, by a special verdict, found that the deceased, when killed, was voluntarily assisting the employes of the road, with their knowledge and consent, in switching the cars; that they discovered his peril, but too late to prevent his death; and that he contributed to it by his presence and effort to uncouple the car.

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The lower court refused to render a judgment for the appellant upon the special verdict, and sustained the general one; and upon this appeal the special findings must be treated as true.

If the deceased could be regarded as the servant or employe of the company at the time of his death, then, being engaged in a common service with its other employes, the company would not be liable for the neglect of the latter unless it were willful, and in the course or purpose of the employment. But he did not, in a legal sense, occupy that relation, and was to it a stranger; and in this light the rights of the parties must be viewed.

A railroad company has the right to the exclusive use and occupation of its yard or track, except at crossings or such places as the public are, by law, authorized to use; otherwise, it could not properly perform its duties to the public. It is not required to anticipate the intrusion of others; and one who enters upon them without right, does so at his peril; and, in case of injury, can not recover, unless it was wantonly inflicted after the danger was discovered. Its duty to such a person or a trespasser is merely negative—it must not, when it knows of the peril, act maliciously or with a disregard of obvious consequences. It is not required to use care to *anticipate and discover* the peril to such a person, but only to do so *after the discovery* of the danger. Until then no legal duty is imposed upon it, because no one, by a wrongful act, can impose a duty upon another. — 107 100.

It is urged, however, that this case, by reason of

the age of the deceased, and his presence upon and about the train with the knowledge of the company's employes, is not governed by the above rule; that it was the duty of the company to prevent his being there; that his age, and the numerous dangers incident to railroading, placed him in constant peril when upon or about the train, even if not engaged in coupling or uncoupling the cars; and that the company, therefore, discovered his danger in time to have saved him, although the immediate peril arising from his effort to uncouple the cars was not known in time to do so. Our sympathies must not be permitted to decide this question. If so, we might do injustice to others, and override fixed rules and principles essential to equal justice.

Without having in view, for the present, the age of the deceased, we remark that the fact that a mere employe knows of the presence of the intermeddler does not legalize it, and so place him as to the company, and within its protection, that it is bound to anticipate and ascertain if he has placed himself in danger, instead of merely being bound to use reasonable care to avert it after its discovery. It has been held that even a request to one, by an employe of the company, to do some act connected with the management of a train, does not impose such a duty upon or render the person less an intermeddler as to the company; and certainly this is so, if the employe has no authority from the company to make the request, or does not occupy such a position toward it and the act to be done, that the authority can be fairly implied. (Everhart

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v. Railroad Co., 78 Ind.; 292; Railroad Co. v. Harrison, 48 Miss., 112; Flower v. Railroad Co., 69 Pa., 210; Degg v. Midland R. Co., 1 H. & N., 773; Mason v. R. Co., 27 Kansas, 84.)

Mr. Pierce says: "A person who undertakes to assist a servant, without the master's request, can not recover against the master for an injury caused by the servant's negligence." (Pierce on Railroads, page 370.)

In the case now before us the special findings do not show specifically what employes of the road, who were present when the accident occurred, knew of, and consented to, the decedent assisting in the switching of the train; but it appears that none of them had any express authority from the company to authorize it, nor is it, in our opinion, shown that any of them occupied such a position toward the company, and the work then in hand, as to imply it. Neither can it be said, that because the deceased was merely upon and about the train, that he was, thereby, in such danger that the company, although he was there without right, were bound to anticipate his injury, and guard against it. The question then recurs, did his age alter this rule? Undoubtedly children of tender years should not be treated strictly as trespassers, when guided by childish instincts they stray upon the track or into the yard of a railroad. Thus the rule that a traveler, about to cross a railroad track, must be vigilant and look both ways, does not apply to an infant of tender years. He knows nothing of care, diligence or danger. The rule as to negligence upon

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his part, and by an adult, is, properly, quite different. The latter must give that care to his own protection which is ordinarily exercised by one of ordinary discretion; while less is required of an infant, the degree depending upon his age, maturity and knowledge. We are aware that it has been held in some cases, as, for instance, in *Flower v. Railroad Co.*, *supra*, that if the deceased is a trespasser, his being of tender years makes no difference, because the company is under no duty to him which requires his protection; but, in our opinion, age should be considered upon a question of contributory neglect; and one should exercise reasonable care to anticipate and prevent an injury to a child of such tender years as to have little or no discretion, although he may be technically a trespasser. His condition excuses his concurrent negligence. Humane considerations require such a rule.

Thus one may incur liability for an injury to a child of tender years, by leaving dangerous machinery where it is accessible to him, although there would be no liability to an adult or a child of years of discretion under the like circumstances. So a railroad company should be held liable if its employes, in charge of its moving train, see that a child, say two years old, is walking around it, and fail to look to its protection, although it may technically be a trespasser, and not, at the moment, in immediate danger. Their neglect to do so would be willful. A child without discretion, although a trespasser, occupies a legal attitude to the company similar to that of an adult, who is not a trespasser,

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save a greater degree of caution should be exercised as to the former, by reason of his helplessness.

If, however, the child, although young, is capable of the discretion required of an adult, the rule applicable to adults must be applied to him. If he has sufficient age and intelligence to know the danger he is incurring, then his negligence will defeat a recovery; and, as in case of an adult, the company is not bound to anticipate and provide reasonably against danger to him; and is only liable, if, after the peril is discovered, it can save him and fails to do so.

The instructions in the case now under consideration substantially told the jury that the company, in its own yard and as to a trespasser, were bound to anticipate his danger and provide against it, without regard to his discretion and age; and no interrogatory was submitted to them for a special finding as to whether, from his age and experience, the deceased had discretion sufficient to recognize his danger and guard against it. The jury should have been so instructed as to enable them to find, or the court, by a finding, informed whether, from the age of the deceased, he had discretion enough to know his danger and guard against it or not; and, if he had, that then, owing to his being a trespasser, the company was not bound to anticipate and provide against peril to him, but only to avoid injuring him, if possible, after his peril was discovered; but that, if, by reason of his age, he lacked such discretion and knowledge of the danger, that then, if the company, by the exercise of ordinary care by

its employes, might have become aware of and prevented it, that then it was bound to exercise it and guard against the injury. Of course we do not mean by this to say that a railroad company is an insurer against accidents to children, and that it is liable for injuries to them which can not well be foreseen; but if they are of such tender years as to be devoid of discretion, then justice and the dictates of humanity require the exercise of reasonable care to prevent their being placed in danger, even though they may be, technically, trespassers; and this would be lacking if the employes of a company were to switch their trains, knowing that a child of such tender years as to have no discretion was in the immediate vicinity of them. (*Smith v. O'Connor*, 48 Penn., 218; *Railroad Co. v. Stout*, 17 Wall., 657.)

The instructions given to the jury were also objectionable, in telling them that if the company was guilty of willful neglect, that then they "*ought*" to find punitive or exemplary damages.

The language of the statute is: "Shall have the right to sue * * * and recover punitive damages." Prior to its enactment no right of action existed when death resulted immediately from an injury; and its object undoubtedly was to extend and give the same rights, in case death resulted, as were, by the common law, given to the injured party, if death did not ensue; and, in the latter case, the allowance of punitive damages was entirely within the discretion of the jury, although the expression, "is entitled to punitive damages,"

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is to be found in the common law text-books, when speaking of injuries from willful neglect.

The fact that the court subsequently instructed the jury that, if they found the company guilty of willful neglect, they *could* find any sum as punitive damages, not exceeding the amount claimed in the petition, did not, in our opinion, cure the error or prevent the jury from being misled.

The definition of willful neglect, as found in the instructions, was also calculated to mislead the jury. It has been repeatedly defined by this court to be an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury.

The jury were also told, that "compensatory damages are such as will, in the opinion of the jury, compensate plaintiff as administrator for his intestate's life; and, in fixing the amount of compensatory damages, the jury can inquire as to the value of the decedent's power to earn money, had he not been killed."

It should have been limited to such power, and the jury not permitted, as they may well have supposed from this instruction they could, to fix some speculative value to "compensate plaintiff as administrator for his intestate's life."

Judgment reversed, and cause remanded for further proceedings in conformity with this opinion.

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CASE 20—PETITION ORDINARY—JUNE 11.

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83	129
86	308
83	129
96	193
83	129
96	389

APPEAL FROM MARION CIRCUIT COURT.

1. **WILLFUL NEGLIGENCE—PUNITIVE DAMAGES.**—In an action under section 3 of chapter 57, General Statutes, for willful neglect, punitive damages may or may not be given, in the discretion of the jury. It was, therefore, error in this case to instruct the jury that they "should" give punitive damages, if they found willful neglect.
2. **RESPONDEAT SUPERIOR.**—The rule that, where one of two fellow-servants is injured by the negligence of the other, the common employer is not liable therefor, does not apply in cases of willful neglect, if the two servants were not co-equals.
In this case it is held that the engineer and a brakeman on the same train were not co-equals, and that the railroad company is liable for the death of the latter, if caused by the willful neglect of the former.
3. **EXCESSIVE VERDICT.**—In an action to recover damages for the loss of the life of a brakeman on a train caused by the willful neglect of the railroad company, a verdict for \$10,000 is not so excessive as to indicate that the jury was influenced by passion or prejudice.

WM. LINDSAY FOR APPELLANT.

1. In actions under section 3 of chapter 57, General Statutes, for willful neglect, the jury may or may not, in their discretion, give *punitive* damages, and it was error in this case to instruct the jury that they "should" give punitive damages, if they should find willful neglect. (General Statutes, chapter 57, section 3; Act 1854, 2 Stanton's Rev. Stats., page 510; L. C. & L. R. R. Co. v. Case's Adm'r, 9 Bush, 783; Chiles v. Drake, 2 Met., 152; M. & L. R. R. Co. v. Herrick, 13 Bush; Sedgwick on Measure of Damages, 7th ed., vol. 1, page 53; Bouvier's Law Dictionary, vol. 1, page 561; Kountz v. Brown, 10 B. Mon., 586.)
2. The verdict is not supported by the evidence. The killing of a brakeman on a railroad train, while he is engaged in the discharge of his duties as such, does not raise the presumption of negligence on the part of the officers having the general management of the train. (Sullivan's Adm'r v. L. & P. Bridge Co., 9 Bush, 88, 89; Pierce on Railways, page 382; Sherman & Redfield on Negligence, section 99; Ill. Central R. R. Co. v. Houck's Adm'r, 72 Ill., 286; Central R. R. & B. Co. v. Kelly, 58 Ga., 114; M. & O. R. R. Co. vol. 83.—9

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- v. Thomas, 42 Ala., 672; L. W. & W. R. R. Co. v. Moore, 72 Ill., 217; Kansas Pacific R. R. Co. v. Salmon, 11 Kansas, 88.)
3. In such a case as this, where contributory neglect can not be relied on as a defense, a verdict ought not to be upheld merely because there was *some* evidence before the jury to support it. (Baulec v. N. Y. & H. R. R. Co., 59 N. Y., 866; Cotton v. Wood, 8 C. B., N. S., 568; Avery v. Bowden, 6 E. & B., 978; McMahon v. Leonard, 6 H. of L. Cases, 970, 993.)
 4. The engineer and brakeman were in a common employment, the one not superior or subordinate to the other, and, therefore, the common employer is not liable for an injury to one by the neglect of the other. (L. C. & L. R. R. Co. v. Cavens' Adm'r, 9 Bush, 565, 566; Doyle v. Swift Iron and Steel Works, MS. Op., May 24, 1888; Randall v. B. & O. R. R. Co., 109 U. S., 478.)

ROUNTREE & LISLE ON SAME SIDE.

1. It was error to instruct the jury that they "*should*" find punitive damages, that being a matter in their discretion.
2. Punitive damages are composed of two elements—*actual* compensation, and compensation for the manner in which the injury was inflicted; therefore, the measure of damages should have been defined to the jury. (Chiles v. Drake, 2 Met., 151; Day v. Woodworth, 18 Howard, 871; Case v. L. C. & L. R. R. Co., 9 Bush, 786; L. C. & L. R. R. Co. v. Mahoney's Adm'r, 7 Bush, 288.)
3. Contributory neglect may be relied upon as a defense in actions under the statute for willful neglect. (Sullivan's Adm'r v. Louisville Bridge Co., 9 Bush, 88; Lou. & Port. Canal Co. v. Murphy's Adm'r, 9 Bush, 580; Digby v. Kenton Iron Co., 8 Bush, 168; Board of Improvement v. Scearce, 2 Duvall, 579.)
4. The verdict is not supported by the evidence. Actions like this are highly penal in their character, and the plaintiff can not make out his case by mere inferences or guesses. He is required to show the acts willful in their character, and the death the necessary result thereof. (City of Lexington v. Lewis' Adm'r, 10 Bush, 680; Day v. Toledo, etc., Railway Co., 42 Mich., 528; Phil. and Reading R. R. Co. v. Schertle, Thompson's American and English R. R. Cases, vol. 2, page 158; Board of Int. Imp. v. Scearce, 2 Duv., 577; Jacobs' Adm'r v. L. & N. R. R. Co., 10 Bush, 272.)
5. The courts readily supervise the verdicts of juries in cases like this. (L. & Port. R. R. Co. v. Smith, 2 Duv., 557; L. & N. R. R. Co. v. Fox, 11 Bush, 516.)
6. It is settled that passenger carriers are not insurers of the safety of passengers. (Ky. Cent. R. R. Co. v. Dils, 4 Bush, 593; L. & N. R. R. Co. v. Sickings, 5 Bush, 1; 2 Redfield on Railways, page 240; Shoemaker v. Kingsbury, 12 Wallace, 369.) Certainly, then, they are not insurers of their employees.

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TEMPLE BODLEY FOR APPELLEE.

1. The statute under which the recovery was had in this case is not unconstitutional because it *requires* punitive damages to be awarded. (*Chiles v. Drake*, 2 Met., 151.)
2. Contributory neglect is affirmative matter to be affirmatively pleaded and proved by the defendant, and is not presumed. (*Louisville and Portland Canal Co. v. Murphy*, 9 Bush, 529; *P. & M. R. R. Co. v. Hoehl*, 12 Bush, 41; *K. C. R. R. Co. v. Thomas*, 79 Ky., 160.)
3. Only willful contributory neglect could exonerate the defendant. (*L. & N. R. R. Co. v. McCoy*, 5 Ky. Law Rep., 405; *Claxton v. Lexington and Big Sandy R. R. Co.*, 13 Bush, 642.)
4. The statute imperatively requires the jury to give punitive damages in cases of this character. It expressly says that the plaintiff "shall have the right to recover punitive damages."
5. The rule *respondent superior* applies in cases of willful neglect resulting in death, although the fellow-servants were co-equals. (*L. & N. R. R. Co. v. Filbern's Adm'r*, 6 Bush, 579.) This case is not discredited by the case of *L. C. & L. R. R. Co. v. Cavens' Adm'r*, 9 Bush, 565.)
6. The evidence shows that the death of the plaintiff's intestate resulted from the willful neglect of the defendant's agents.

J. PROCTOR KNOTT AND S. B. BERRY ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellee, personal representative, to recover damages for the destruction of the life of Charles Brooks, by the alleged willful neglect of appellant's agents and servants; and judgment having, in accordance with the verdict of the jury, been rendered for \$10,000, a reversal is asked upon three grounds:

1st. That the verdict is not sustained by the evidence, and is contrary to law.

2d. The damages awarded by the jury are excessive, appearing to have been given under the influence of passion or prejudice.

3d. The court erred in giving the instruction asked for by appellee.

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The deceased lost his life at Lebanon while in the employment of appellant as brakeman on a freight train, consisting of twenty-four loaded cars, which had arrived there after night-fall, an hour or more behind time, on the way to Louisville.

The train was stopped on the main track near the depot, and the engine, attached to some of the cars, was moved to the side-track, leading to the depot, for the purpose of leaving a car and taking another, and also to obtain a supply of sand, the other portion of the train having been cut off and left on the main track. But after reaching the side-track the engineer discovered that it was impossible for the engine to push the number of cars he had attached, on the wet rails, up the ascending grade, and was, consequently, compelled to return to the main track and leave some of them. After the necessary transfer of cars was made and sand obtained from the depot, the train was again united, and left for Louisville; and some time afterwards Brooks was discovered lying near the main track, dead.

It was a dark, rainy night, and no witness saw the deceased killed; nor did those connected with the train know it until informed by a telegram sent to the conductor, at a station some distance from Lebanon. Whether his life was lost by the alleged willful neglect must, therefore, from necessity, be determined by the attendant facts and circumstances proved. And it seems to us evident, that if it was so destroyed, it must have occurred while he was in the discharge of his duty as brakeman, coupling or attempting to couple the two parts of the train,

and resulted from the great violence with which they were made to come in contact, or the unnecessary and reckless continuance of the driving force of the engine after they had come together. No other theory is suggested in behalf of appellee, nor is there any evidence showing his life was destroyed in any other way that could render appellant liable.

It is placed beyond question that he was run over by the train. A broken lantern, evidently used by him, was found near the track; sixty feet or more south of it was his body, which had been dragged across thirty-two cross-ties; and between the two, but nearest the lantern, was his hat.

At the place where the trail of his body on the cross-ties began was blood, and two witnesses saw indentations there, just inside the north rail—one, as if made by a boot-heel wrenched in the ground, and the other, an impression of a person's knee. And this was about where the train was first cut, and where it was the duty of the deceased, as rear brakeman, to be, in order to couple the cars, if necessary for any one to do so. There is, however, evidence tending to show that the coupling-pin was fixed in such way, by the conductor, as to drop into its place, coupling the cars, when they came together, without human aid. And from that fact the inference is attempted to be drawn, that there being no necessity for the deceased to be there, he was not between the cars for the purpose of coupling, but was there by his own negligence or for some different purpose. But the train was cut in two places on the main track, and it does not,

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clearly appear at which one of them the pin was adjusted; nor, if it was at the place the deceased was killed, that he was informed of it by the conductor.

In our opinion it can be reasonably inferred that the deceased was, at the time, not only at the place for the purpose of performing his hazardous duty of coupling the front to rear portion of the train, but was on the track between the two cars to be coupled, actually so engaged; and, as he had his lantern with him, the conductor, as well as the engineer, might have ascertained before backing the train, as it was their duty to do, whether he was at the place in the discharge of that duty or not.

From the evidence, it appears that the engineer was, on that occasion, in an ill-humor; that there was such unusual noise and confusion while the train was there, as to awaken persons in the neighborhood of the depot and cause comment; one witness, experienced in operating trains, testifying that it was reckless switching; another, that he never before heard such jamming and banging of cars; and a third, that there was a great crash of cars coming together, two or three minutes before the train left. There is, however, evidence tending to show that it was impossible for the part of the train to which the engine was attached to strike the rear part with such force as to knock it sixty feet, without breaking the cars. Nevertheless, it is an undisputed fact that twelve or more loaded cars were either knocked or pushed back on wet rails, up an ascending grade, that distance or more; and

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that the deceased was prostrated and dragged, in the manner mentioned, though he was an experienced, active and vigilant brakeman.

As the case is presented, the verdict is not, in our opinion, so palpably against the weight of evidence as to authorize a reversal on that account.

But it is contended for appellant, that, as the life of the deceased was destroyed by the negligence of the engineer of the train, if any one, no recovery can be had in this action; because, being employes in the same service, and neither being superior or subordinate to the other in its performance, they must be regarded as, at the time, substantially agents of each other; and, consequently, appellant, the common employer, can not be made legally answerable for the death of one by the negligence of the other.

Waiving inquiry as to how far, if at all, the conductor, who had control of the train, is responsible, we will consider the question as raised by counsel.

Unquestionably, when a person is employed in the service of another, he undertakes to risk all the ordinary perils incident thereto; and, as between a number of persons employed in the same service, "there is an implied undertaking to risk all the contingencies which the ordinary skill or care of each other, in his line of service, could not avert. But this implied undertaking between the company and its employes in the same class of service does not exonerate the company from liability for damage resulting to one of such agents from extraordinary or gross negligence of another." (L. &

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N. R. R. Co. v. Robinson, 4 Bush, 507.) This rule had, in the Collins case, 2 Duvall, 118, where the authorities were referred to and the subject fully considered, been announced as in accordance with principle, analogy and policy; and it was adhered to and approved, not only in the Robinson, but also in the Filbern case, 6 Bush, 574.

The question before the court, in the case of L. C. & L. Railroad Co. v. Cavens' Adm'r, 9 Bush, 559, referred to by counsel, was as to the liability of the company for the destruction of the life of an engineer on one of its trains, by a collision, occurring through the negligence of the conductor of another train; and the precise question presented in this did not arise in that case. But we do not perceive any inconsistency between the rule by which that case was decided and the one adopted and applied in the previous cases referred to. In the Cavens case is this language: "Is it not more reasonable to make the company, whose duty it is to employ careful and skilled agents for the conduct of its business, and when it alone controls such agents, liable for such neglect of duty, than to adjudge that a mere subordinate, who has no means of knowing the qualification of the agent for such position, or voice in his selection as such, and without means or power to resist or control his action, is without remedy, except as against the party committing the negligent act?"

That question is pertinent in this case, and can, according to the uniform ruling by this court, be answered but one way.

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The engineer and brakeman, on the same train, are not, as assumed by counsel, co-equals; for the latter has no right to resist the former, when acting in his appointed sphere, but is bound to implicitly obey his signals; and, as between them, there is no reason or consideration of policy to imply, on the part of the brakeman, an undertaking to look to the engineer alone, and not to the company, for security against his willful neglect, even conceding such should be the rule as between co-equals. In our opinion, therefore, appellee has a right to maintain this action for the cause stated in his petition.

2d. No limit to the amount of damages which may be recovered in cases of this kind is definitely fixed by law; nor, under the Civil Code, can the court trying the case grant a new trial, nor this court reverse, upon the ground of excessive damages, unless it appear they were given by the jury under the influence of passion or prejudice; and there being no evidence the jury were so influenced in this case, except the large amount of damages awarded, the single inquiry is, whether that fact alone authorizes us to disturb the verdict.

Doubtless it might be reasonably inferred, when the damages are palpably excessive, extravagant and unusual, that the jury was influenced in awarding them by passion or prejudice; and, in such case, it would be the duty of the court to interpose. But having considered and compared with this the cases heretofore considered by this court, involving the same question, we can not say the verdict in this case is relatively excessive or extraordinary; and,

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consequently, to set it aside would, in our opinion, be a departure from the course this court has heretofore felt constrained to pursue, and an invasion of the province of the jury it should always hesitate to make.

3d. The instruction of which appellant complains is as follows: "The court instructs the jury, that if they believe, from the evidence, that the life of Chas. Brooks was lost or destroyed by the willful neglect of defendant's servants or agents, engaged in running or managing the train, they should find for the plaintiff such punitive damages as they think proper, not exceeding the amount claimed in the petition."

The objection made to this instruction is, that the court, upon the hypothesis stated, instead of leaving to the discretion of the jury to find or not to find for the plaintiff punitive damages, peremptorily instructed them to so find, allowing discretion only as to the amount.

Whether this instruction is liable to the objection made, depends upon the meaning intended by the Legislature to be given to section 3, chapter 57, General Statutes, already quoted.

It is, however, contended for appellee that the section is mandatory, and in unambiguous terms requires the court to instruct the jury to give punitive damages in every case of loss or destruction of life by willful negligence, without regard to the conduct of the deceased, the relation of the parties, or the circumstances under which it may occur. Of course, if this be so, there is nothing left for court or jury but to obey the law as it is written.

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But is such the necessary and only proper meaning that the language used is susceptible of? We think not.

The right to sue for punitive damages, in such cases, is not inevitably followed by a recovery.

The first, the Legislature has the power to give, exists alone in virtue of the statute, and, clearly, can not be called in question. But a recovery, to a great extent, and the amount of recovery altogether, depends upon the merits of each case, as passed upon and determined by the jury, and can not be constitutionally controlled by legislative will. And, as a consequence, while such an instruction as the one in question is calculated to unduly and unfairly influence the jury to increase the damages beyond what they would give if left a discretion, and required to act on their own responsibility, they still may not, being under no compulsion to do so, find more than mere nominal punitive damages, even if the construction of the section contended for be adopted.

It is, therefore, at least a reasonable inference that the Legislature intended simply to give the right to sue for punitive damages, which it had the power to do, leaving the assessment, which is practically beyond legislative control, to be made according to the familiar common law rule adopted and applied in actions for personal injuries by the courts of this State since its organization, which requires the court to instruct the jury to give compensatory damages, and, also, in their discretion, punitive damages, where the injury is the result of willful negligence, malice or oppression.

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Such was the construction given to the act of 1854, not materially different from the section under consideration, in *Chiles v. Drake*, 4 Met., 146, which was the first case before this court under that act; and there has not since been a departure from the views then announced.

In that case the court said: "It is contended that the term punitive damages excludes the idea of damages for compensation; and, consequently, if any recovery can be had under the act, it must be for punitive damages alone, and nothing can be allowed for compensation. This, however, is a mistaken view of the meaning of the statute in authorizing the recovery of punitive damages against the offending party. The damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury."

By an act approved January 12, 1866, which is similar to section 6, chapter 1, General Statutes, it is provided that the widow and minor child, or either, of a person killed by the careless, wanton or malicious use of fire-arms, or other deadly weapon, not in self-defense, may have an action against the person who committed the killing for reparation of the injury; and in such action the jury *may* give vindictive damages.

By section 1, chapter 31, Revised Statutes, identical with section 1, chapter 32, General Statutes, it is provided that the widow and minor child of a person killed in a duel, or either of them, may have an action against the surviving principal, the seconds,

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and all others aiding or promoting the duel, or against any one or more of them, for reparation of the injury, and in which the jury *may* give vindictive damages, for the suppression of the practice of dueling.

The General Statutes is intended to be a harmonious system of laws, operating justly and equally; and it is the duty of the courts to give such construction to the different parts of the system as will effectuate that object, when it can be done without doing violence to the language used and defeating the manifest intention of the Legislature, which may, and in our opinion ought to be done in this case.

But if the construction appellee's counsel contends for be proper, we have a system so incongruous and anomalous, that while in an action for the destruction of life willfully, as is always the case in a duel, or even maliciously, as provided against in section 6, chapter 1, punitive or exemplary damages may or may not, in the discretion of the jury, be given. In actions like this, where death results from willful neglect, which is merely *quasi* criminal, the court is required to arbitrarily instruct and the jury to find punitive damages, though the servant or agent, who is not sued, be guilty, and the employer, against whom the damages are assessed, be entirely without fault.

Such a construction, in our opinion, was not intended by the Legislature, nor is it required by the language used.

It is obvious how the amount of damages might

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have been increased by reason of the instruction in question, as it is manifest that there might be cases arising under that section in which punitive damages should not be given, and where, if left to the discretion of the jury, they would not be given. Whether this is such a case, it is not our province to now decide.

It is sufficient that the verdict of the jury has been rendered under an instruction that should not have been given, and which was calculated to prejudice the rights of appellant.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

88 142
84 108

CASE 21—INDICTMENT—JUNE 11.

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APPEAL FROM SCOTT CIRCUIT COURT.

1. A DE FACTO OFFICER is one who discharges the duties of an officer under color of title.

One who, having been elected to an office, assumes to exercise its duties without having qualified or *attempted to qualify*, is without color of title, and is not a *de facto* officer.

2. ARRESTS.—One who is not a peace officer, either *de jure* or *de facto*, does not, by assuming to exercise the duties of such an officer, acquire any more authority to make an arrest than any other private individual, and one who kills such a person in resisting arrest by him is to be tried as if the deceased had not been acting as an officer.
3. IN RESISTING AN ARREST attempted to be made by a person without authority, one has the right to use only such force as is necessary to protect himself from the assault, and has no right to.

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take the life of the person attempting to make the arrest unless it is necessary to save his own life, or his person from great bodily harm.

4. ONE WHO KILLS A PEACE OFFICER to prevent arrest, knowing, or having reasonable grounds to believe, that he is a peace officer, is guilty of murder.
5. IT IS FOR THE COURT, AND NOT THE JURY, to determine whether one attempting to make an arrest had the right to do so.

A. H. WARD FOR APPELLANT.

1. The deceased was not marshal, either *de jure* or *de facto*, at the time he was killed. (Acts 1879, volume 2, page 996; General Statutes, pages 683, 809, 811.)
2. As to rights and liabilities of officers *de facto* and *de jure*. (Rodman v. Harcourt, etc., 4 B. Mon., 224; Morgan v. Vance, 4 Bush, 323; Alsop v. Commonwealth, 4 Ky. Law Rep., 547; Mockabee v. Commonwealth, 78 Ky., 880; York v. Commonwealth, 6 Ky. Law Rep., 334; Fleetwood v. Commonwealth, 80 Ky., 1; Wharton's Criminal Law, vol. 1, pages 416-18; Criminal Code, sections 26, 35, 36, 37, 39, 42, 43, 46; Hoglan v. Carpenter, 4 Bush, 89; Biggerstaff v. Commonwealth, 11 Bush, 169.)

P. W. HARDIN, ATTORNEY-GENERAL, FOR APPELLEE.

The deceased was a *de facto* officer acting in good faith, and his act of arrest was binding as between appellant and appellee. (Morgan v. Vance, 4 Bush, 326; Patterson v. Miller, 2 Met., 496; Stokes v. Kirkpatrick, 1 Met., 143; Alsop v. Commonwealth, 4 Ky. Law Rep., 551.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant, James Creighton, was indicted, tried and convicted of manslaughter, for the killing of one Ambrose Wilson, and sentenced to confinement in the State prison for twenty-one years.

The defense claimed that the deceased assaulted the accused, and the latter, in resisting the assault, used no more force than was necessary to protect his own person from bodily harm. The prosecution attempted to prove that the deceased, Wilson, at the time he was shot, was the town marshal of Sadiesville, and, as such, had the right to arrest and

take charge of the person of the accused, who, in the opinion of the officer, was about to commit a breach of the peace. The attempt to make the arrest brought on the altercation, both parties shooting at each other, the deceased losing his life by a shot from the pistol in the hands of the accused.

The appellant denied that the deceased had the right to arrest him for the reason, in the first place, that he was not about to commit a breach of the peace; and, secondly, that the deceased was not town marshal, and, therefore, had no right or power to arrest him.

If the deceased was town marshal the appellant had no right to resist the arrest, but should have allowed himself to be taken charge of by the officer, and made his defense before the justice instead of taking the law into his own hands; and if the deceased was not an officer *de facto* or *de jure*, the accused had no right to use more force than was necessary to protect himself from the assault of the deceased, and certainly no right to take the life of the deceased, unless it was necessary to save his own life or his person from great bodily harm. The defense had the undoubted right to show that the deceased, in attempting to arrest him, was acting without any authority; and that being a fact in issue, the court should have determined the question, and not the jury, as to the right of the deceased to make the arrest. Whether the facts constituted the deceased a peace officer was with the judge and not the jury; and if there had been sufficient evidence of the right of the deceased to act

as an officer of the town, then if, when acting in the discharge of his duties, he was shot and killed by the accused for the purpose of preventing the arrest, the latter knowing him to have been a peace officer, or having reasonable grounds to believe that he was, subjected himself to the severest penalty known to the law.

The trouble arising in this case springs from the objection made by the defense, that no instruction should have been given by which the right of the accused to resist the arrest was, or might have been, excluded from the consideration of the jury.

It appears from parol testimony that the deceased had been elected marshal of the town, but that he failed to qualify, or to attempt to qualify, as such in the mode provided by law.

Deputy marshals were sometimes appointed without any authority under the charter of the town, and the deceased was sworn in, at one time upon the street, to act as marshal for one week, or for a shorter time. The deceased seems to have been recognized as marshal of the town, and on these facts it is argued that he was an officer *de facto*, although not an officer *de jure*, and had the right to arrest the accused.

By section 10 of chapter 81, General Statutes, "no officer, from whom a covenant is required, shall enter upon the duties of his office until the same is given;" and by section 12, of the same chapter, it is provided that: "If the official bond is not given, and the oath of office taken, within thirty days of the time when the officer was elected, or received notice of his ap-

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pointment, or of the time when his appointment ought to take effect, the office shall be considered vacant, and he shall not be re-eligible thereto for two years."

There was no warrant or authority from any justice or conservator of the peace commanding the deceased to make this arrest; and his voluntarily assuming the duties of a town marshal gave him no such power, and while his acts as an officer may have been sustained, so far as they affected the rights of third persons—and this is questionable—if he had been sued by the accused for an assault upon his person, in his attempt to make the arrest, his acting in an official capacity would have afforded him no protection.

He had not even received a certificate of his election, and there is no pretense that he ever attempted to qualify as required by law, but, on the contrary, was acting as an officer when the office was made vacant by reason of his failure to qualify; and when, by the provisions of the statute, he was ineligible to fill the position for two years. He, therefore, had no more right to make the arrest, because he believed a breach of the peace was about to be committed in his presence, than a private individual had, and the case should have been tried without reference to his having acted in an official capacity.

If the deceased had executed his bond and entered upon the discharge of his duties as marshal without taking the oath, being otherwise eligible, this would have made him an officer *de jure*, or certainly his qualifications could not be questioned until some

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proceeding had been instituted and his office declared vacant. A mere irregularity in the qualification of an officer, or in the attempt to qualify, where he has entered upon the discharge of his duties, can not be inquired into in a collateral proceeding, for the purpose of invalidating his right or title to the office; but in this case the party acting as an officer never qualified or attempted to qualify, and was ineligible for the position when the arrest was made. Under such circumstances his assertion of claim to the office, and the discharge of its duties, can afford him no protection. He was a trespasser and liable to an action by the accused for the attempt to arrest him, and his usurpation of the office afforded him no justification. (Rodman v. Harcourt, &c., 4 B. M., 224; Pearce v. Hawkins, 2 Swan, 87.)

An officer *de facto* is one who discharges the duties of an office under color of title. His official acts are binding on third persons, but not valid in his own behalf; and Mr. Bishop says that one may be indicted for assaulting an officer *de facto*, although the authorities are conflicting. In the case of *The People v. Hopson*, 1 Denio, 574, the accused, when indicted for assaulting a constable who had not taken the oath of office, or given security, was denied the right of showing that the constable was not a legal officer, upon the ground that the Commonwealth (a third party) was complaining and not the constable; and yet it is in substance held in that case, that if the constable had been sued for the attempt to make the arrest, or had himself sued for the assault, his acting in an official capacity

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would have afforded him no protection. We readily perceive the necessity for holding the acts of *de facto* officers binding on third persons, but are unable to see the reason for justifying Hopson in his assault upon Lassels in a civil action, and then deny to Hopson the right of such a defense when indicted for this same assault. If right in the citizen to resist an arrest, when attempted to be made by one who is not an officer *de jure*, to the extent that the officer has no redress, when assaulted by the citizen, to prevent the arrest, the doctrine applicable to the rights of third parties should not be carried so far as to enforce a penalty upon one who has done no more than to use the force necessary to resist an unlawful act upon the part of another. If guilty of a breach of the peace, by reason of the altercation, or of a felony, by reason of the use of more force than was necessary for the protection of his own person, then the power of the Commonwealth could be rightfully asserted.

When one claims not only the right to discharge the duties of an office, but asserts the right of taking into actual custody the person of the citizen, without any warrant of authority, and because, in his judgment alone, the party should be arrested, he acts at his peril. He is required to know, before he takes such action, that his right to do so is unquestioned.

Nor does it necessarily follow that one assuming the duties of an office, or exercising the authority of an officer, thereby makes himself an officer *de facto*; but the action of those who have color of

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title, in the attempt to discharge such duties, becomes so important to the public that the rights of third persons can be protected in no other way than in holding their acts valid as to them. In this case it is manifest that the accused had the right to resist the arrest, but to use no more force than was necessary for that purpose; and the case should have been heard and tried as if the deceased was not acting, or attempting to act, at the time, as an officer of the law.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

CASE 22—PETITION EQUITY—JUNE 11.

Savings Bank of Louisville's Assee., &c., v.
McAllister's Adm'r.

83	149
99	242
83	149
107	304
83	149
109	317

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **ASSIGNMENTS BY OPERATION OF LAW—LIMITATION.**—In order to have a transfer of property by an insolvent debtor declared to operate as an assignment for the benefit of creditors, it is necessary not only to file the petition attacking the transfer within six months, but to sue out summons against the transferee and the debtor within that time.
2. **PARTIES TO ACTION.**—Although, where the transferee has made an assignment for the benefit of creditors, he is still a necessary party to the action attacking the transfer, it is not necessary that he should be made a party within the six months. If the petition is filed, and summons issued, against his assignee and the debtor within that time, a *lis pendens* is created, and the right to attack the transfer saved.

THOMAS AND JOHN SPEED FOR APPELLANT.

1. Under the "Act of 1856" there can be no action unless the debtor and the transferee are made defendants; and although the trans-

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- ferree has made an assignment for the benefit of creditors he is still the owner of the property, and must be made a party within the six months. (General Statutes, chapter 44, article 2, section 3; *Lyons v. Fields*, 17 B. M., 549.)
2. Until summons was issued against the bank, the transferee in this case, there was no action against it. (*Cecil v. Sowards*, 10 Bush, 98; *Ware v. Coleman*, 6 J. J. M., 197; *Stivers v. Prentice*, 3 B. M., 462; *Ruby v. Grace*, 2 Duvall, 540; *Long v. Montgomery*, 6 Bush, 395.)
 3. The six months prescribed by the statute is not limitation. The plaintiff has to rely upon a remedy purely statutory, and must follow the statute strictly. (*Cogar v. Stewart*, 78 Ky., 61; *Given, Haynes & Co. v. Gordon*, 3 Met., 539; *Maddox v. Fox*, 8 Bush, 402.)
 4. The issue has been materially changed since the former appeal, and this appeal presents a new question. (*Cov. & Lex. R. R. Co. v. Bowler's Heirs*, 9 Bush, 502; *Wilkinson v. Perrin*, 7 Mon., 216.)

ROZEL WEISSINGER ON SAME SIDE.

W. O. & J. L. DODD FOR APPELLEE.

1. The matters now complained of as errors were all apparent on the face of the record before the court on the former appeal, and were adjudicated against the appellant. (*McAllister's Adm'r v. Savings Bank*, 80 Ky., 684; *Wilkinson v. Perrin*, 7 Mon., 216; *Cov. & Lex. R. R. Co. v. Bowler*, 9 Bush, 502; *Shropshire v. Reno*, 5 Dana, 584; *Shockley v. Neiss*, 3 J. J. Mar., 96; *Massie v. Anderson*, 2 Litt., 271.)
2. The assignee and the debtor, who were summoned within six months, were the necessary and substantial parties to the litigation, and the six months' limitation ceased to run when the petition was filed and summons issued against them. (General Statutes, chapter 44, article 2, section 2; *Ibid.*, chapter 71, article 3, section 1; Civil Code, section 89; *Hall v. Grogan*, 78 Ky., 11; *Butts v. Turner*, 5 Bush, 435; *Cogar v. Stewart*, 78 Ky., 61; *Terrill v. Jennings*, 1 Met., 459; *Wintersmith v. Pointer*, 2 Met., 460; *Given, Haynes & Co. v. Gordon*, 3 Met., 539; *Whitehead v. Woodruff*, 11 Bush, 209.)
3. The courts are liberal in allowing amendments to the original cause of action for the purpose of avoiding the running of the statute of limitations. (*Ill. Cen. R. R. Co. v. Phelps*, 4 Ill. App., 238; *Ill. Cen. R. R. Co. v. Cobb*, 64 Ill., 128; *King v. Avery*, 37 Ala., 123; *Dudley v. Price*, 10 B. M., 88; *Augusta Mfg. Co. v. Ver-trees*, 4 Lea (Tenn.), 75; *Scoby v. Sweatt*, 28 Tex., 713; *Killebrew v. Stockdale*, 51 Tex., 529; *Wade v. Clark*, 52 Iowa, 158; *Guild v. Parker*, 48 N. J. Law, 430; *Maples v. Mackey*, 22 Hun., 230;

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- White v. Ward, 85 Barb., 637; Garland v. Chattle, 12 Johns., 429; Wilkins v. Phillips, 8 Ohio, 49; Massie v. Matthews, 12 Ohio, 351; Ferguson v. Gaze, 12 La. Ann., 667; Speake v. Barrett, *Ibid.*, 472; Emory v. Keigan, 88 Ill., 488; Horton v. Banner, 6 Bush, 597.)
4. The transferee does not occupy the position of an innocent purchaser. (Drake v. Ellman, 80 Ky., 439.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

Jonas H. Rhorer conveyed his property, on January 16, 1880, to the appellant, the Savings Bank of Louisville, and it subsequently conveyed its property, including that derived from Rhorer, to Stephen E. Jones in trust, for the payment of its debts. The appellee, being a judgment creditor of Rhorer, brought this action on July 10, 1880, under article 2, chapter 44, of the General Statutes, or what is commonly known as the Act of 1856, for the purpose of having the deed from Rhorer to the bank declared to operate as a general assignment for the benefit of all his creditors.

It was beyond question a preference within the statute, which provides that such a transfer "shall be subject to the control of courts of equity, upon the petition of any person interested, filed within six months after the mortgage or transfer is legally lodged for record; * * * but it shall not be necessary to make any persons defendants except the debtor and the transferee."

The action was brought within the limited time; but while the debtor, Rhorer, and Jones, as the assignee of the bank, were made defendants in the original petition, the bank was not made a defendant until an amended petition was filed for this purpose, on March 28, 1881, and then more than the

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statutory period named had expired. The question presented, therefore, is, whether the failure to make the bank a defendant within the six months named defeats the action, notwithstanding the fact that the debtor and the assignee in trust of his transferee were not only parties to the action, but duly summoned as such within the time named.

It is urged, in behalf of the appellee, that while under the general limitation law an *action* must be commenced within a certain period, which, under the Code, is not done until not only a petition is filed but a summons issued upon it, that yet the statute in question only requires that a *petition* be filed within the six months in order to save the plaintiff's right; and that, even if this be not so, yet that it is certainly immaterial when the summons is issued, or the warning order made against the transferee, provided some necessary defendant is summoned within said period. With this view we do not concur. It is unreasonable to suppose that the Legislature intended to permit a plaintiff to preserve his right under the statute as against the transferee, and to affect the latter's rights, without giving him proper notice within the limited time of the pendency of the action; and, as held by this court in the case of Cecil v. Sowards, &c., 10 Bush, 96, the act, being of a date subsequent to the adoption of the Code, should be construed in connection with it; and it is, therefore, not only necessary to file the petition, but to sue out a summons against the transferee within the time fixed by the statute.

The bank had, however, by the assignment to Jones

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as trustee, placed him in its place as to its property, including that conveyed to it by Rhorer, and as to all remedies against it. He had the possession and held the legal title to it, the appellant having only a remote or uncertain equity in it; and, while owing to this equity, it was a proper and necessary party to the action, as was said by this court upon the former appeal of this case (80 Ky., 684), yet, as the assignee was vested with both the title and possession, and was legally the representative of Rhorer as to the property, both reason and a reasonable construction of the statute lead to the conclusion that the right to attack the conveyance by Rhorer was saved by the filing of the petition against and service of summons upon him and the assignee of the bank within six months from its execution.

The bank had not only parted with the title, but all right to represent and control the property as to actions relating to it; and the object of the statute in requiring that the transferee shall be made a defendant, is to enable the court to reach the property and divest him of the possession and title; and if they have vested in another, by an assignment in trust by the immediate transferee of the debtor, then the assignee and debtor are the necessary parties against whom the petition must be filed and summons issued within the statutory period, in order to create a *lis pendens* within the meaning of the statute, and save the right to attack the transfer of the debtor. The court must have the debtor within its power, in order to administer on his estate; and also the one holding the title and in possession of it, in

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order to divest him of them. This conclusion is strengthened by the fact, that although this right is a statutory one, yet the purpose of the statute is equitable; and it should, therefore, as was held in the case of Terrill, &c., v. Jennings, &c., 1 Met., 450, be liberally construed in order to effect the legislative intention.

Judgment affirmed.

88	154
86	131

88	154
93	114

CASE 23—PETITION EQUITY—JUNE 18.

Northern Bank of Kentucky v. Deckerbach, &c.

APPEAL FROM KENTON CHANCERY COURT.

1. **LIENS—LIS PENDENS.**—A mere action to subject property upon which the plaintiff has no specific lien, there being no equitable grounds that would authorize the Chancellor to subject it, creates no *lis pendens*, and will not defeat a subsequently acquired attachment lien; but where a lien exists as between the plaintiff and defendant, and the plaintiff brings the property into court for the purpose of enforcing his lien, a *lis pendens* is created which will give the plaintiff priority over a subsequent attaching creditor, although, prior to the action, no lien existed as to creditors by reason of the fact that the plaintiff's lien was not recorded.

In this action to enforce a vendor's lien upon a brewery, and the personalty usually belonging to such an establishment, all the property, including property acquired by the defendant after his purchase from the plaintiff, was placed in the hands of a receiver. Thereafter other creditors of the defendant had attachments levied upon the property. *Held*—That as to the property sold by the plaintiff to the defendant, upon which the plaintiff had an unrecorded lien, a *lis pendens* was created which operated to give the plaintiff priority over subsequent attaching creditors; but as to the after-acquired property, upon which the plaintiff had no lien, no *lis pendens* was created, and the liens of the attaching creditors have priority.

2. **CONDITIONAL SALES—MORTGAGE.**—The executor and devisees of a decedent sold to appellant, a large creditor of the estate, a brew-

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ery, which formed a part of the estate, and with the money thus obtained paid off all the debts of the decedent. An absolute conveyance was made to appellant, but it was agreed, at the time, that appellant should sell the property to L., one of the devisees, on a long credit, which appellant did accordingly, and executed to L. its bond for title. Prior to appellant's purchase it had refused to take a mortgage on the property. *Held*—That the transaction between L. and appellant was a sale, and can not be regarded, in connection with the sale to appellant, as a mortgage.

3. THE LIEN OF SUPPLY MEN, provided for by the act of March 20, 1876, is not superior to a vendor's lien.

McKEE & FINNELL FOR APPELLANT.

1. The conveyance by appellant to Louis Geisbauer was intended by the parties to be an *absolute* sale, and not a mortgage, and that intention must govern. (Jones on Mortgages, vol. 1, sections 267, 268, 326, 327; Edrington v. Harper, 3 J. J. M., 355; Morris v. Morris, 2 Bibb, 311; Brinkerhoff v. Lansing, 4 Johnson's Ch'y Rep., 76; Perine v. Dunn, *Ibid.*, 141; Baxter v. Willey, 9 Vt., 276; Holmes v. Fresh, 9 Mo., 201; Phoenix v. Gardner, 18 Minn., 480.)
2. The agreement by which all the notes were to become due and payable upon default in payment of any one, was a binding and valid contract. (Story on Promissory Notes, page 34.)
3. The lien of supply men, under the act of March 20, 1876, is not superior to a vendor's lien. Moreover, that act does not apply, because this is not an action to settle the estate of a decedent or a trust estate. (Acts 1876, vol. 1, page 114.)
4. The appellant, by instituting suit and bringing the property into the custody of the court, acquired a lien which can not be overreached by subsequent attachments. (Scott v. McMillan, 1 Litt., 298; Scott v. Coleman, 5 Mon., 73; Watson v. Wilson, 2 Dana, 406; Thomas v. Southard, *Ibid.*, 480; Newdigate v. Lee and Rees, 9 Dana, 20; Burkett v. Stewart, 8 B. M., 115; Newport & Cin. Bridge Co. v. Douglass and Cline, 12 Bush, 789; Edgell v. Hayward, 3 Atk., 356; Milward v. Cochran, 7 B. M., 346.)
5. As to what constitute fixtures, and the right of the vendor to subject them. (Elwees v. Mawe, 2 Smith's Leading Cases, 228-231; Wallace v. Merchant's Ins. Co., 4 Met. (Mass.), 306; Broome's Maxims, page 425; Thomas v. Grant, 5 Bush, 39-40; Drake on Attachments, page 458; Johnson v. Wiseman, 4 Met., 459; Clore v. Lambert, 78 Ky., 324.)

W. H. MACKOY FOR APPELLEES.

1. The transaction between appellant and Louis Geisbauer was a mortgage, and not a sale. (Jones on Mortgages, vol. 1, sections 241,

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- 244, 245, 246, 248, 258, 263, 264, 266, 331; Honore v. Hutchings, 8 Bush, 387; Edrington v. Harper, 8 J. J. M., 353; Story's Eq. Jur., vol. 2, section 1018; Skinner v. Miller, 5 Litt., 86.)
2. As to the personal property, the title of appellant was void as to creditors and subsequent purchasers, one of the vendors remaining in possession. (Brummell v. Stockton, 3 Dana, 134; Morton v. Ragan & Dickey, 5 Bush, 334; Hunnelly v. Webb, 3 J. J. Mar., 643; Woodrow v. Davis, 2 B. Mon., 298; Dale v. Arnold, 2 Bibb, 606; Baylor v. Smither's Heirs, 1 Litt., 106; Daniel v. Holland, 4 J. J. Mar., 22; Middleton v. Carroll, 4 J. J. Mar., 151; Meredith v. Sanders, 2 Bibb, 102; Enders v. Williams, 1 Met., 346; Swigert & Shreve v. Thomas, 7 Dana, 220.)
 3. As to what constitute fixtures. (Clare v. Lambert, 78 Ky., 224.)
 4. Appellant's proceeding was a *lis pendens* only as to property upon which it had a lien. The cases cited by appellant's counsel do not support their claim. (Ross v. Wilson, 7 Bush, 29.)
 5. The appointment of a receiver is simply the taking of property into the custody of the court. It does not affect the right or title to property. (Kerr on Receivers, pages 159, 161, 163; Ellicott v. U. S. Ins. Co., 7 Gill, 307; *In re Rachel Colvin*, 3 Md. Ch'y, 280; Ellicott v. Warford, 4 Md., 80; Receivers v. Gas-light Co., 3 Zab., 283; Daniell's Ch'y Pl. and Pr., page 1716, and note 2 to same, and pages 1740-41; Rowlett v. Eubank, 1 Bush, 477; Johnson v. Gunter, 6 Bush, 534.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Charles Geisbauer, at the time of his death, was the owner of a large brewery in the city of Covington, including all the realty upon which it was located, and the fixtures and personalty usually belonging to such an establishment. He was largely indebted to the Northern Bank of Kentucky, and other parties, whose debts were finally paid off by money obtained from the bank, in the following manner: The children, or devisees, and the executor of the will of Geisbauer being desirous of having the debts paid, and to prevent a sale of the property, at the instance of creditors applied to the Northern Bank of Kentucky for a loan of \$60,000,

and proposed to secure this loan by a mortgage on the property.

The bank declined to take a mortgage, as the proof shows, and, by subsequent negotiation, purchased the entire brewery of the widow, heirs, and executor for the sum of \$60,000, and obtained an absolute conveyance therefor. The bank, at the time of the purchase, and when it acquired the absolute title, agreed to sell, and did sell, to Louis Geisbauer, a son of the decedent, the same property on a long credit, with the agreement to re-convey to him; and the further agreement that if any of the notes were not paid at maturity, the whole of the purchase money should fall due. Louis Geisbauer failed to pay one of the installments, and a suit was instituted by the bank to enforce the vendor's lien; and, at the instance of the bank, Louis Geisbauer having been in the possession of and running the brewery, and without objection, the entire brewery, with all the fixtures and personalty used about the establishment, and the beer on hand as well as the books, were placed in the hands of a receiver as the property of Louis. The debts of the estate of his father had been paid by the bank, or the money obtained under its purchase, and those debts were no longer in existence. The bank did not propose to run the brewery, but made the purchase to secure its own debt, and then sold it to Louis, on a long credit, for near \$80,000. The parties in interest, who were liable for this debt to the extent they received assets from the original debtor, were no longer liable. The executor of the debtor was released by

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the bank's purchase from any obligation to pay, and all the creditors of Charles Geisbauer satisfied. These creditors had been paid by the bank, or from the proceeds of the sale. The bank then stood as the vendor, and Louis Geisbauer as the vendee of the property. It was a new obligation, with altogether different parties to it, and must be regarded as a sale and not a mortgage. Whilst it was understood that Louis was to re-purchase the property, which he did in fact do, and obtained the bond of the bank for title, one can not well see how the transaction is to be denominated a mortgage; and, when looking to the testimony on this point, as to the intention of the parties, there is but little room for doubt as to the proper meaning of this transaction between the bank and Louis Geisbauer. But whether a sale or mortgage, the trouble in this case arises in determining the character and extent of the sale to Louis, and the interest he acquired by the purchase.

All he purchased was the real estate on which the brewery stood, with the boundary specifically given. This included the building itself and the fixtures; and, no doubt, as is alleged by the bank, included all the beer, ale, malt liquors, horses and wagons, and personalty used about the establishment. The latter entered into the possession as purchaser, and these appellees furnished him material and supplies, and gave him credit on the faith of the profits in his possession and under his control. How far the lien of the bank extended, is the question involved here. That it had a vendor's lien

is manifest; but that it had a lien by contract or by operation of law on the personal estate of Louis, its vendee, although on the premises, as against creditors, can not be maintained.

It is argued by counsel for the bank, that because the entire brewery was placed in the hands of, and taken into custody by, the court's receiver, that this gave the bank a lien, or rather made it a *lis pendens* against the creditors of Louis.

These creditors, by attachment, levied on this property, or its proceeds, including the property acquired by Louis after his purchase, and were made parties to the action by the bank, and the cases consolidated.

The proceeding seeking to subject the fund was in accordance with the provision of the Code. The institution of the action by the bank to subject the property, including the realty, the personalty, book accounts, etc., upon the idea that a lien existed, did not, of itself, create a lien, nor was it such a *lis pendens* as gave the bank a right to subject it to the payment of its debts, for no other reason than that a receiver had been appointed, without objection, and the property sold. If no lien existed on the personalty, as between Louis and the bank, the Chancellor, unless the bank had adopted some provisional remedy, would have ordered the proceeds of the personalty paid over to the debtor. A fair construction of the contract of sale, in the light of the pleadings and proof, gave to the bank as between it and Louis Geisbauer a lien on all the property, real and personal, that had been purchased by the bank and sold

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to Louis. The personalty was regarded by them as a part of the brewery and indispensable to its use, and such the bank alleges was the intention of the parties. If so, when the bank came to enforce its lien, having brought the property into court, or its proceeds under the sale by the receiver, it was then a *lis pendens* as against these creditors, although without such custody by the court no lien as against them would have existed. As between Louis Geisbauer and the bank a lien did exist, but as to creditors it did not exist, as the lien was not of record, and the possession under the sale was with Louis, the vendee.

Before the creditors, however, assert their claims, the bank has this property or its proceeds in court for the purpose of discharging its lien as against Louis, and this *lis pendens* operated to defeat the claims of the attaching creditors as to this property. Not so as to the property acquired by the vendee after his purchase, except such as should be properly denominated fixtures. There was no lien retained on the after acquired property, or on the accounts and demands due Louis after his purchase. This amounted, as the record shows, to over \$6,000, and was directed to be paid by the judgment to the appellees. The appellant, the bank, had no right to subject it. It had no lien on the property or the accounts as between it and Louis, and, therefore, there was no reason why any creditor might not intervene so as to reach the fund in court; that, as between Louis and the bank, the latter had no lien upon or right to subject as the pleadings stand.

The mere attempt to enforce a lien when one does not exist, does not create any priority in point of time as against an attaching creditor who acquires a lien by a levy of his attachment.

If the position of counsel is the correct one, then all provisional remedies could be dispensed with, as the action itself would constitute the lien.

The cases of *Scott v. Coleman*, 5 Monroe, 73; *Watson v. Wilson*, 2 Dana, 406; *Scott v. McMillen*, 1 Littell, 302, can not be made to apply to this case.

It is not necessary that the plaintiff should have a specific lien. He may, by his return of no property, assail a fraudulent conveyance, and the action is a *lis pendens* so far as subsequent attaching creditors are concerned. It creates a lien against all subsequent creditors who are seeking to reach it by provisional remedies; but a mere action to subject that upon which the party has no specific lien, and without any equitable grounds that would authorize the Chancellor to subject it, creates no *lis pendens*.

The fact that the money is in the hands of an officer of the court and is the proceeds of property sold in the action, does not authorize the Chancellor to direct its payment in discharge of the judgment or in its partial discharge. This is not a proceeding to settle up an insolvent estate, nor a trust estate, nor is it a suit for distribution between creditors, but is an action to enforce a vendor's lien; and the question as to priority of right arises as between the vendor and the attaching creditors.

This case is not affected by the act of March 20, 1876, providing for liens on behalf of laboring and

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supply men. There is no assignment for the benefit of creditors, but a vendor's lien existing as against creditors. The lien of the supply men is made superior to the lien of *any mortgage or other encumbrance heretofore or hereafter* created, but does not apply to the lien of the vendor of realty.

In the settlement made by the commissioner it appears that the proceeds of the personalty accumulated by the debtor, including the accounts due him, etc., amount to as much as the Chancellor has awarded the appellees, who were the attaching creditors; and, therefore, this judgment will not be disturbed, either on the original or cross-appeal. Nor can we see in what way the bank has been prejudiced by the order of court sustaining the attachments. The bank has no interest in the after-acquired property, and the debtor is not complaining, nor has he controverted the grounds of the attachment.

The judgment is affirmed on both the original and cross-appeal.

CASE 24—PETITION EQUITY—JUNE 18.

Harrison, &c., v. Commonwealth.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. THE PRACTICAL CONSTRUCTION GIVEN TO A STATUTE through a long period, and acquiesced in by all departments of the government, should control the court in construing it, even though that construction may contravene the letter of the law.
2. A STATUTE SHOULD BE CONSTRUED according to its equity, the object to be accomplished being considered.

83	162
106	757

83	162
106	172

83	162
121	261

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3. COMPENSATION OF ASSESSORS.—The statute which allows the assessor fifteen cents "for each person's list of taxable property," entitles him to that amount for each "list" returned by him, whether it embraces property or not.

GOODLOE & ROBERTS FOR APPELLANTS.

1. An order of the county court allowing an assessor's claim is a judgment, and can not be collaterally attacked, the jurisdiction of the county court as to that matter being unlimited. (*Commonwealth v. Cain*, 80 Ky., 818; *Jacobs' Adm'r v. L. & N. R. R. Co.*, 10 Bush, 369.)
2. The act of April 24, 1880, in so far as it attempts to authorize a collateral attack upon orders of courts allowing claims, is unconstitutional. (*Cooley's Const. Limit.*, pp. 503, 504, and notes.)
3. It was the duty of the Commonwealth, through its authorized agents, to see that no more was allowed or paid the assessor than he was entitled to, and the surety of the assessor is, therefore, not liable for the excess paid. (*Calloway v. Snapp*, 80 Ky., 565.)
4. After the Auditor has passed a claim all questions of error and illegality are "closed out and concluded," and the claim can then be attacked only for fraud.
5. The act of calling on a person, swearing him and listing his name, entitles the assessor to the compensation fixed by the statute, although the person "listed" has neither property nor family. This has been the practical construction placed upon the law for years, and it has been acquiesced in by all departments of the government. (2 *Morehead & Brown*, 1870, 1871, 1876, 1880; 3 *Statutes of Ky.* (Loughborough), pages 514, 519; 2 *Revised Statutes*, pages 248-9, 252, 253; *General Statutes*, chapter 92, section 8.)
6. The long continued practical construction of the statute should prevail. (*Smith on Constitutional Construction*, section 624, page 741; *Warfield's Will*, 22 Cal., 71; *Barbour v. City of Louisville*, 83 Kentucky, —; *United States v. Moore*, 95 U. S., 763; *Bridgford & Co. v. Newman*, MS. Opinion, 1880; *Pennington v. Woolfolk*, 79 Kentucky, 19.)
7. A statute should be construed according to its equity and its reason, and not according to its letter.

ISAAC T. WOODSON ON SAME SIDE.

The practical construction placed upon the statute for such a long period, and acquiesced in by the law-making power, should control. (*Surgett v. Lapice*, 8 How. (U. S.), 71; *United States v. Pugh*, 99 U. S., 265, 269; *United States v. Lytle*, 5 McLean, 17; *Maloney v. Mahan*, 1 Mich., 26; *McKeen v. Delancy*, 5 Cranch, 22; *Union Insurance Co. v. Hoag*, 21 How. (U. S.), 36; *Williams v. Dayton*, 55 N. Y., 378; *Story on Constitution*, 408; *Sparrow v. Kingman*, 1 N. Y., 260;

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Pratt v. Brown, 8 Wis., 609; Cooley's Const. Lim., page 65; 1 Kent's Commentaries, page 475; Yerger v. Allen, 1 Yerg., 376; Pennington v. Woolfolk, 79 Ky., 25; Commonwealth v. Whipps, 80 Ky., 280.)

THOMAS F. HARGIS AND T. L. BURNETT, OF COUNSEL FOR APPELLANTS, ARGUED ORALLY.

Briefs not in record.

P. W. HARDIN, ATTORNEY-GENERAL, AND HELM & BRUCE FOR APPELLEE, IN PETITION FOR REHEARING.

Brief not in record.

1. As to rules for the construction of statutes. (Boston v. Smith, Walker's Ch'y (Mich.), 395; Bosley v. Mattingly, 14 B. Mon., 73; U. S. v. Warren, 4 McLean, 460; Allen v. Mutual Fire Ins. Co., 2 Maryland, 120; Rex v. Poor Law Commissioners, 1 Neville & Perry, 375; Bartlett & Waring v. Morris, 9 Porter (Ala.), 258; Paulina v. U. S., 7 Cranch, 52; Barker v. Estey, 9 Vt., 138; Pierce v. Atwood, 13 Mass., 343; Nichols v. Wells, Sneed, 259; Manser v. Chester, 22 Pick., 387; Holbrook v. Holbrook, 1 Pick., 250; Evans v. Jordan, 9 Cranch., 203; Jarot v. Jarot, 2 Scam., 11; Weathers v. Stewart, Cain's Cases, 54; Way v. Cary, 1 N. Y. Term Rep., 191.)
2. As to the meaning of the word "property." (Conn v. Jones, Hardin, 8; Neyfong v. Wells, *Ibid.*, 562; Holbert v. Dearing, 4 Littell, 9.)
3. No instance can be pointed out where the words "taxable property," as used in the General Statutes, mean any thing except property from which taxes can be collected.
Fifty-seven instances cited where, as counsel contend, from the context of the section in which the words are used, the idea is excluded that any thing is meant except property from which taxes can be realized.
4. If the judgment is to stand reversed the court should remand the case, with directions simply to overrule the demurrer to the answer, thus giving the plaintiff an opportunity to amend. (Bullitt's Code, section 138; Baker & Rubel v. Whipps, MS. Op., 6 Ky. Law Rep., 307.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The assessor of Jefferson county returned upon his books for 1883 a report, in accordance with the statutory form, as to 76,205 persons, of whom only 21,232 owned any taxable property.

The number returned by him in 1884 was 78,343, of whom but 21,871 had any estate; but the entire number returned for both years were either tithables or property owners, and the question is now, for the first time, presented to this court, whether an assessor is entitled, under the statute, to pay for each and every list taken by him, whether it embraces property or not? Its decision involves the construction of the statute, which provides that "the amount allowed shall not exceed fifteen cents for each person's list of taxable property, and the same shall be paid by the Treasurer upon the warrant of the Auditor." (Gen. Stat., chap. 92, art. 5, section 8.) The form prescribed by it, and the blanks in accordance therewith which are furnished to the assessor, contain forty-five items as to which the person being listed must make answer, under oath to be administered by the assessor; and he can not return any one as delinquent, without first applying at his residence for his list; nor is he entitled to any compensation until he makes oath that the person "rendering the list" made oath to its truth. It is urged, upon the part of the State, that a blank space, where the items of property are to be enumerated in case the person being listed owns them, is not a "list of taxable property;" that these words in the statute divest it of all doubtful import, and that they must be disregarded in order to allow the assessor pay for taking the list of one who has no estate. Upon the other hand, it is asserted that when the officer has taken the sworn statement of the person liable to pay tax, in ac-

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cordance with the statutory form, that it is, in legal contemplation, his "list of taxable property," although, in point of fact, it embraces no property. For instance, his name is first entered; and even if he has no property, yet the assessor must enter his statement, upon oath, as to the number of his children, if any, between six and twenty years of age, and the other items or information as required by the form; and it is insisted that when this has been done it is his "list of taxable property," within the meaning of the law.

A brief review of the former legislation upon the subject, and the light in which it has been regarded by those charged with its execution, will aid in arriving at a correct conclusion.

The form for the list, prescribed by the act of January 13, 1814, enumerated twenty-two items; and by the act of February 2, 1819, entitled "An act to alter the mode of taking in *lists of taxable property*," and in the body of which is found the expression "list of taxable property," the commissioner of tax, as the assessor was then called, was allowed such compensation as the county court might see proper to certify to the Auditor.

This was changed by the act of January 29, 1829, which, like the present law, provided "that it shall be the duty of such commissioners to apply at the residence of every individual in his county or district, liable to taxation, for his *list of taxable property*," and allowed not exceeding five cents for each list taken by "the commissioners of *taxable property*."

By the act of January 4, 1840, entitled "An act to change the form of the commissioners' books of *taxable property*, and to regulate the duties of the commissioners of tax, and other officers, in relation to the same," a new form, containing twenty-nine items, was provided; and it, by way of illustration, gives the names of supposed persons and their lists, and the last one named is "Peter Mosby," whose list is an entire blank, save the statement that he is a white male, over twenty-one years of age, and has six children between seven and seventeen years of age. By an act approved March 3, 1842, it was provided that the county courts should make allowances to "commissioners of *taxable property*" of not more than eight cents for each list; and by the Revised Statutes, adopted in 1852, the same pay was allowed for "each list of *taxable estate*." They also prescribed a new form of assessment, of thirty-five items, and interchangeably speak of it as a list of "*taxable property*" or "*taxable estate*;" and section 14, article 6, chapter 83, required the person giving the list to enumerate, as a part of it, the estate owned by him, and taxed in any other State. The General Statutes, adopted in 1873, provide still another form, and which is the one now in force, and which furnishes to the State, when returned by the assessor, much valuable information, aside from taxation. By it the number of voters; the number of children between six and twenty years of age; and many other facts necessary to the existence of the State, and the proper conduct of its affairs, are ascertained; and this list is repeatedly spoken of in

the statute now in force, as it was in the previous ones, as the "list of taxable property."

The expression read in the light of all the previous legislation leads to the conclusion that the allowance to the assessor does not depend upon the property returned, but upon the taking of the list; and that the entry of the name of Peter Mosby and his six children, as prescribed in the act and form *supra*, in which he is mentioned, and which relates to "*taxable property*," constituted his "list of taxable property," within the meaning of the law. Again, if this be not so, and the pay is to depend upon property being returned which will add to the State's revenue, then, in case an assessor under the provision of the Revised Statutes, providing that a person should list his property situated in, and taxed by, another State, had taken the list of one who had no other property, yet he would not have been entitled to any pay for it, because it was not subject to taxation in this State, and no benefit, by way of taxes, would have been obtained save the poll-tax on the tithable. It would seem from this that it is not the items embraced in the list, but the taking of it, which gives the right to compensation, and that it is based upon the lists and not the items in them. Technically speaking, it requires more than one item to make a list, and yet it will hardly be claimed that an assessor is not entitled to pay for taking one which contains no property, save one tract of land worth thousands of dollars; and yet, in a strict sense, this would not be "a list of taxable property."

In construing a statute the object to be accomplished must be considered. In this instance it is to obtain the sworn statement of the person liable to taxation as to his property, and the other information required by the law. He may not own any taxable estate, but he must state, on oath, whether his statement is true. It can not be said that if one has no property that the oath should not be administered to him, or that if he refuses to take it or disclose his condition as to property, that he is not liable to a penalty.

When his sworn statement has been obtained, its truth or falsity may, under the law, be otherwise ascertained; and it should not be presumed that the Legislature, in enacting the law, relied for a faithful performance upon the part of the assessor upon the character or amount of his compensation, which, at most, is inadequate, instead of his oath of office and the bond he is required by law to execute. If so, and his compensation is to depend entirely upon the property returned, then, with equal force, it can be contended that he would neglect his duty in obtaining the other information required by law, and which is highly important to the State, and yet does not relate to property. But let us return to the meaning of the expression, "list of taxable property," as used in the statute, and suppose that one of the citizens of Louisville should contract with its mayor to ascertain the taxable property of each citizen living upon Jefferson street, at the price of ten cents for each list. Now, would it be any answer to the claim for compensation.

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that the mayor was not bound to pay for the list of those who, upon investigation, appeared to own no property? Certainly not, because this would not accord with the meaning of the contract or the intention of the parties. Here the State has said to the assessor, if you ascertain each man's taxable property in your county you shall have not exceeding fifteen cents for each person's list; but it is claimed that when he applies for his compensation he must be told that, although you applied to A for his list, and he was subject to taxation, yet, as he rendered a return of *nulla bona*, and you made the same return to the State, you have no claim for taking the list.

But although this question is *res integra* in this court, yet it is not required by its opinion to establish a practical construction of the statute. The very fact that persons, and even courts, are differing as to its meaning, tends strongly to show that it is, at least, of doubtful import. It is alleged in the answer, and admitted by the demurrer to it, that the State, through its county courts and its executive department, has, for many years, allowed and paid for each list, whether it embraced property or not. The executive branch of a government must necessarily give a construction to the laws which it must execute; and if its construction has been followed for years and in view of, and without interference by, the law-making power, then such contemporaneous and long continued construction should not be departed from without the most cogent reasons. A long continued practice under a

statute, under such circumstances, ripens into an authoritative construction of it. The law, in its regard for the public good, goes so far, in some cases, as to hold that *communis error facit jus*; but courts should be slow to set up a misconception of the law as the law, and there is no need of it in this instance; but it is proper to regard a long continued *communis opinio* in construing it. The object of construction is to give effect to the legislative intent. Its *will* and not its *words* are the law. In the language of the Supreme Court of the United States, in the case of the United States v. Moore, 95 U. S., 763, "a thing may be within the letter of a statute, and not within its meaning; and it may be within the meaning, though not within the letter," and the *meaning* and not the *letter* must control.

A case within even the reason, but not the letter of a remedial statute, is embraced by it. Admitting, for argument sake, that the *letter* of the statute under consideration does not allow the assessor any pay for a list which does not embrace property, yet the legislative meaning has been placed beyond question by the action of the State. It was said by Chief Justice Marshall, in the case of Cohens v. Virginia, 6 Wheaton, 418, that "great weight has always been attached, and very rightly attached, to contemporaneous exposition," and this rule is so well settled that citation of authority is needless. Not only those claiming rights under the law now in question, but the county courts of the State, and those who have had charge of its ex-

ecution have, for over a half a century, interpreted it otherwise; and while this was being done the various Legislatures, and the people behind and over them, have known of it and recognized it by failing to interfere. They have, in fact, not only ratified it by their silence, but by their action. Knowing the practical construction which was being put upon the provision of the statute, as contained in the Revised Statutes of 1852, the Legislature re-enacted it in equivalent and nearly the same language in the one now in force, thus virtually re-enacting that construction; giving it the force of a positive law, and placing beyond question that it was the one intended by the law-making power. Judicial precedent or exposition could not give greater sanctity to it; and as the language of the statute and the legislation upon the same subject, in force prior to its enactment, render it, at least, of doubtful import, we can not doubt, in view of the long continued legislative, executive and judicial action as to it, that the interpretation placed upon it by the lower court is incorrect. It is urged that if the pay of the assessor be insufficient, yet that this is a matter for legislative consideration. This is conceded, but yet every statute should be construed according to its equity, and it must be assumed that the Legislature intended to give a fair compensation for the services to be rendered; and if the view now taken by the State of the statute were to prevail, then the assessors would, by no means, receive a compensation adequate to the labor required of them; and this is an argument against the soundness of the position.

and leaves little room to doubt the wisdom of the construction which has been followed for so many years, undisturbed by legislative or judicial action. It takes the assessor of Jefferson county and his nine assistants, each furnishing a horse, six months to assess the county, and if only allowed for the lists which embrace property, they would each receive but about three hundred dollars. The pay of the assessors of other counties would be still more inadequate, and especially so in the sparsely settled ones. Moreover, the proportion between those who own taxable property and those who have none, would vary greatly in different counties, and there would be little uniformity in the compensation for the labor.

In this instance the assessor, in accordance with the long continued practice, has received his pay for each list, whether it embraced property or not, and has disbursed the most of it to his assistants; and the legislative intention, shown by a long continued practical construction under the act, ought not to be defeated by a decision of this court, even admitting that it would accord with the letter of the law. The demurrer to the answer of the appellants reached back to the petition, and it should have been dismissed; and the judgment is reversed, with directions to do so.

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CASE 25—PETITION ORDINARY—JUNE 18.

Bruce's Adm'r v. Cincinnati R. R. Co.

APPEAL FROM PULASKI CIRCUIT COURT.

1. TRANSITORY ACTIONS UNDER FOREIGN STATUTES.—The rule that actions transitory in their nature will lie in this State if process be served here on the defendant, although the cause of action arose in another State, applies as well to actions under the statutes of other States as to common law actions, provided this State has a statute similar in character and import to the statute under which the action is brought, whatever may be the rule where this State has no such statute.
2. WHENEVER THE STATUTE OF ANOTHER STATE GIVES A RIGHT OF ACTION for the destruction of the life of one person by the negligence of another, such action may be maintained here, unless the court is satisfied the statute was not intended to operate beyond the limits of the State enacting it, our statutes giving a right of action in such cases; and where both statutes expressly authorize the personal representative to maintain the action, and the persons entitled to the amount recovered are the same under both statutes, the personal representative appointed in this State may maintain the action here under the foreign statute, the cause of action having arisen under that statute.
3. OVERRULED CASE.—The case of Taylor's Adm'r v. Pennsylvania Company, 78 Ky., 348, is overruled, in so far as it is in conflict with this.

CURD AND WADDLE FOR APPELLANT.

1. Where the statute of another State allows an action for damages by the personal representative of one who has been killed by the negligence of another, a personal representative appointed in this State may maintain an action here under that statute, the defendant being served here, this State having a statute similar in character. (Wharton's Conflict of Laws, sections 710, 712, 719; Story's Conflict of Laws, section 556; Leonard v. Columbia Steam Navigation Co., 84 N. Y., 48; Dennick v. Railroad Co., 103 U. S., 17.)
2. The case of Taylor's Adm'r v. Pennsylvania Co., 78 Ky., 348, is unlike this; but, if not, it should be overruled.

MORROW AND NEWELL FOR APPELLEE.

1. There can be no recovery in this State under the statute of Tennessee. Such statutes were not intended to have any extra-terri-

88	174
1102	483

88	174
105	4
105	8

88	174
113	950
114	478
114	481

88	174
111	46

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torial force. (Taylor's Adm'r v. Pennsylvania Co., 78 Ky., 348; Richardson v. N. Y. Cent. R. R. Co., 98 Mass., 85; Woodward's Adm'r v. M. S. & N. J. R. R. Co., 10 Ohio St., 121; McCarthy v. Chicago, Rock Island and Pacific R. R. Co., 18 Kan., 26.)

2. Even conceding that there may be a recovery in this State under the foreign statute, where our statute upon the subject is substantially the same, there can be no recovery in this case, because the Kentucky statute authorizes a recovery in such cases only where there is willful neglect, while the Tennessee statute authorizes a recovery for simple negligence.
3. Gross negligence is not synonymous with willful neglect. (Board v. Int. Imp. v. Searce, 2 Duv., 576; Jacobs' Adm'r v. L. & N. R. Co., 10 Bush, 263; City of Lexington v. Lewis' Adm'r, 10 Bush, 677; Hansford's Adm'r v. Payne, 11 Bush, 380.)

C. B. SIMRALL ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellant, George Bruce, administrator of the estate of Robert Bruce, deceased, to recover of appellee, the Cincinnati Railroad Company, damages for the destruction of the intestate's life.

It is stated in the petition that appellee is a corporation, created by law, of the State of Ohio, and was, at the time the intestate was killed, operating, as lessee, the Cincinnati Southern Railway, which extends through a part of Ohio, through Kentucky, and a part of Tennessee; that the intestate was employed by appellee as a brakeman; and while engaged in the performance of his duties as such, the train of cars upon which he was so engaged was, by the negligence of the servants and agents of appellee, superior in authority to him, permitted to collide with another train of appellee, in the State of Tennessee, by reason of which he was immediately killed.

In an amended petition it is stated that the inte-

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tate lost his life in the manner stated in the original petition, through the gross and willful carelessness and negligence of his co-employees, engaged with him, at the time, in operating trains, who were superior in authority to him.

A second amended petition was filed, in which it is stated that appellant was first duly appointed and qualified as administrator of his intestate, in the State of Tennessee, and, as such, instituted an action in a circuit court there, which was, before the commencement of this action, dismissed, because the defendant had no agent in that State upon whom service of summons could be executed; that the intestate was, at the time of his death, a resident of the State of Kentucky, and engaged as a brakeman on the section of the railroad extending from Somerset, in Kentucky, to a station in Tennessee; that the lease of appellee expired a short time after the intestate was killed, when appellee discharged all its officers and agents, in the State of Tennessee, upon whom service of process could be executed, and have not since, and do not intend to have, any officer or agent upon whom service of summons can be executed in that State.

It is further stated, that under the laws of the State of Tennessee, if a person is killed by the negligence of another, the right of action for the injury causing the death does not abate or become extinguished by the death, but such right of action passes to the administrator of the deceased; that such action is allowed to the administrator against a railroad corporation for the killing of its employe by

the negligence of another employe, having a grade of service in the employ of the corporation superior to that of the one killed; that the amount of recovery in such case is the damage for the suffering and anguish of the decedent, and for the loss of his services to the next of kin, and if the negligence which caused his death is gross, the jury may give vindictive or exemplary damages.

It is further stated, that all of the next of kin, and heirs at law of the decedent, who was under twenty-one years of age at his death, reside in the State of Kentucky, and are the same persons who will be entitled to whatever amount might be recovered in the action for the death of the intestate under the laws of the State of Tennessee.

A general demurrer having been sustained to the petition and amendments, the first question presented on this appeal is, whether the life of appellant's intestate, having been destroyed in the State of Tennessee, an action can be maintained here for the recovery of damages therefor? and, if so, the further question arises, whether a personal representative, appointed under the laws of this State, can sue for and recover such damages?

There is no doctrine better settled than that common law actions, transitory in their nature, will lie in this State, if process be served here on the defendant, although the cause of action arose in another State; and this rule has, from the beginning, been applied as well to actions *ex delicto* as to those *ex contractu*. For, in the case of *Watts v. Thomas*, 2 Bibb, 458, it was held that an action for assault

and battery, committed in the State of Indiana, then a territory, would undoubtedly lie in a court of this State.

The right of action in this case does not, however, exist at common law, being founded solely upon the statute of another State, and it is contended, for that reason, the rule does not apply.

We are unable to perceive any valid reason for the distinction, for the common law exists in the States where it prevails only in virtue of statute laws, and is subject to modification or repeal altogether. In fact, in one of the States of the Union it never has existed.

In the case of *Dennick v. Railroad Co.*, 103 U. S., 18, similar to this, and where this question was directly involved, the Supreme Court of the United States held as follows: "Whenever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matter, and can obtain jurisdiction of the parties;" and, said the court, "we do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey can not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else, because it depended upon statute law and not upon common law? It would be a dangerous doctrine to establish that, in all cases where the several States have sub-

stituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred."

In *McDonald v. Mallory*, 77 New York, 547, the doctrine was laid down, that where the wrong is committed in a foreign State or country, no action can be maintained in that State without proof of the existence of a similar statute in the place where the wrong was committed. And the court, in the subsequent case of *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y., 48, commenting on that rule, said: "The rule there laid down is just and reasonable, and it is not essential that the statute should be precisely the same as that of the State where the action is given by law, or where it is brought, but merely requires that it should be of a similar import and character." Several cases have been cited by counsel for appellee to show that the right to bring such an action has been denied in other States.

In *Richardson v. N. Y. C. R. R. Co.*, 98 Mass., 85, the plaintiff brought an action in Massachusetts for damages under the statute of New York, for the killing of the intestate in the latter State. There was, at the time, no statute of Massachusetts of a similar kind, and it was held the action could not be maintained. In *Woodward v. Mich. S. & N. I. R. Co.*, 10 Ohio St., 121, the court said: "The difficulty in this case proceeds from a mistaken assumption, that because a statute of Illinois confers a right of action, and imposes a trust upon an administrator under the laws of that State, that an administrator, appointed and acting under the laws

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of this State may bring that action and perform that trust." But the court made a question, whether the petition in that case went far enough to make out an action under the statute of Illinois, and left the question open whether an administrator, appointed under the law of Illinois, might or might not maintain such an action, for the purpose of recovering the fund to be distributed under the law of Illinois.

There is some conflict of authority in the different States as to the right of action in cases like this. But it seems to us that it is impossible to refuse the application of the rule in cases where the right of action is founded upon statutory enactments without disregarding the true reason for the rule as it exists at common law, which is founded on comity between the States.

Whether, as held in *Dennick v. Railroad Co.*, the principle should be applied, even when the State where the action is brought has no statutes of a similar character to those existing where the life is destroyed and the cause of action arose, we do not deem it necessary to now decide.

There is some difference between the statutes of this State and the State of Tennessee on the subject. In this State punitive or vindictive damages can be recovered only in case of willful negligence; but such damages may be recovered in Tennessee, when the life is destroyed by gross negligence. But in each State the right is given to the personal representative of a person whose life is destroyed by the negligence of a person or corporation, or the

agents and servants of such person or corporation, to sue for and recover damages. The statutes of each State give a right of action for a similar cause that did not exist at common law; they are founded on the same reasons of public policy, and are substantially alike in their import and character; and we see no reason for denying the right of action in this case that would not apply in the case of any other injury done to the person in the State of Tennessee, for which a remedy might be sought in the courts of this State.

Therefore, taking the statements of the petition and amendments as true, we are of the opinion the action can be maintained, and recovery had, in this State, in the same manner, for the same cause, and to the same extent, as if the action had been brought and prosecuted in the State of Tennessee, where the cause of action arose.

The remaining question is, whether the personal representative of the intestate, appointed under the law of this State, is the proper party plaintiff.

According to the law of the State of Tennessee, as appears from the petition, the personal representative appointed in that State would be authorized to bring and maintain the action there. But he could not, in virtue of such appointment alone, maintain the action here. And, as it is alleged in the pleadings, and must be taken to be true, that the defendant is no longer in the State of Tennessee, could not, at any time after the cause of action arose, nor can ever be served with process there, it follows, if the present plaintiff can not maintain the action, no re-

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covery can ever be had; and those for whose benefit the action is authorized to be prosecuted, will be deprived of their remedy because no one has the legal right to sue.

It seems to us that a simple statement of the proposition that a defendant who has been guilty of a personal injury may defeat a recovery altogether by leaving the State where the wrong was committed, and thus avoid the service of process, is a sufficient answer to any objection that might be made to the personal representative appointed here, who is the only one authorized to sue, maintaining the action. Besides, the only objection that could be made to his bringing the action is met by the allegation in the petition and amendments, that the persons who would, by the laws of Tennessee, be entitled to whatever might be recovered in the action reside in this State, and are the same who would be entitled under the laws of this State.

We are of the opinion appellant has the right to maintain the action; and as the lower court erred in sustaining the demurrer, the judgment must be reversed, and cause remanded for further proceedings consistent with this response:

To a petition for a rehearing Judge LEWIS delivered the following reponse.

In Story on Conflict of Laws, section 38, it is said: "In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them

by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of courts but comity of nations which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

It can not be shown, nor is there any attempt made in the petition for rehearing to show, that there is any rule restraining, or that it would be prejudicial to the policy or interests of this State to permit the operation here of the statute of Tennessee under which this action was brought. On the contrary, we have a statute of similar character and import.

But counsel suggest, as a question, whether the Tennessee statute confers the right of action in a case like this, *alone* upon a personal representative of its own appointment, or on *any* personal representative.

The tacit adoption of it by this State being presumed, the main inquiry is, whether the operation of the Tennessee statute is, by its own terms, or by fair construction, restricted to that State. If it is, then the controversy is at an end, for no one can maintain an action under it in this State. But if it is not, then the next inquiry, which is always of secondary importance, is, who is the proper party plaintiff in the action?

It seems to us there can be no difficulty in determining that question. For, as the statute of Tennessee and the statute of this State relating to the

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same subject both expressly authorize the personal representative to maintain the action, there can be no room to doubt his right to do so, if it can be maintained at all.

The Tennessee statute, as set out in the pleadings in this case, certainly is not, in terms, confined to that State. Nor can we presume that the unqualified right of action given by it was intended to be excepted from the operation of the rule, universally recognized, that the remedy for a personal injury may be sought and obtained in any court that can consistently, with the policy and interests of its own government, take jurisdiction of the person of the defendant and the subject-matter.

We are unable to perceive any reason for a construction, the result of which would be to afford the remedy against only those who might be served with summons in that State, usually persons domiciled there, while needlessly denying it against the wrong-doer who flees from process into another State, where he might be made to answer.

Counsel call our attention to Taylor's Adm'r v. The Pennsylvania Co., 78 Ky., 348.

In that case the action was based on an Indiana statute, as follows: "When the death of any one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for any injury for the same act or omission. The action must be commenced within two years. The damages can not

exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

In that case it was said: "The personal representative does not take it (the right of action) in virtue of his office, but is the person designated by the statute in whose name it is to be recovered, not for the ordinary purposes of administration, but to be distributed as a trust fund. That a personal representative, as such, has no right or powers beyond the jurisdiction of the government under whose laws he received his appointment, and *a priori* he can not have any rights, nor be subject to any obligation or duties not imposed by the laws of his official domicile." And again: "If the appellant could recover in this action, she would hold the sum recovered subject to be disposed of under the laws of this State. It would be subject to the payment of her husband's debts, and might be wholly consumed by them, and thus a part of the law under which she seeks to recover would be defeated."

None of those reasons, whether sound or not, apply to this case. For it is alleged by the plaintiff that the persons entitled under the Tennessee statute to the amount recovered are the same persons who would have been entitled if the cause of action had occurred in this State and the action had been brought under the statute of this State. Nor has the administrator in this case any rights or powers, nor is he subject to any obligations or duties, in virtue of the Tennessee statute not already conferred and imposed by the statutes of this State.

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It is true it was held in that case that the Indiana statute was not intended to have any extra-territorial operation. But the reason it was so held was, that the administrator appointed under the laws of this State could not take the right of action in that case in virtue of his office, but as a trust for the widow, children and next of kin of the deceased; and thus he would have to be invested with rights and perform duties which the Indiana Legislature had no power to prescribe, and which it was presumed it did not intend to prescribe, except as to personal representatives appointed in that State. In this case no such reasons apply for holding the statute operative only in the State of Tennessee.

It seems to us, therefore, that there is no necessary conflict between the conclusion reached in that case and the one we have arrived at in this. On the contrary, the principal ground upon which the right of action in this State was in that case denied, was that the statute conferring it was not intended by the Indiana Legislature to have operation beyond the limits of that State.

But it is proper to say that, in our opinion, whenever the statute of another State gives a right of action for the destruction of the life of one person by the negligence of another, such action may be maintained here, unless the court is satisfied it was not intended to operate beyond the limits of the State enacting it. For, as has been correctly and aptly said, "where the right is found the remedy must follow of course;" and it can not in this State be lost for the want of a proper party to sue,

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either the real party in interest or some one in his stead, in every case having the right to maintain the action. And so far as the case of Taylor's Adm'r v. The Pennsylvania Co., *supra*, conflicts with the opinion in this case, it is overruled.

Petition for rehearing overruled.

CASE 26—PETITION EQUITY—JUNE 18.

Power v. Dougherty.

APPEAL FROM BATH CIRCUIT COURT.

IF AN INFANT DIES WITHOUT ISSUE, having title to real estate derived from one of his parents, the whole descends to the kindred of that parent, provided such kindred are not more remote than the grandfather, grandmother, uncles and aunts of the infant; and in determining how the estate shall pass, as between the kindred of the parent from whom the title was derived, it is not material how or from whom the parent obtained the title.

In this case the infant's estate having been inherited from his mother, it is held that upon his death without issue it passed to his maternal *grandfather* and not to his maternal *uncles and aunts*, although his mother obtained the estate through her mother and not through her father.

R. GUDGELL & SON FOR APPELLANT.

Upon the death of the infant without issue the estate derived by him from his mother passed to her kindred, without regard to how she had obtained title. Therefore, his uncles and aunts on the mother's side are to be preferred to his grandfather on the same side. (General Statutes, chapter 81, section 9, page 371; Vice v. Vice, &c., MS. Op., November 8, 1881; Driskill v. Hanks, &c., 18 B. Mon., 862; Talbott's Heirs v. Talbott's Heirs, 17 B. Mon., 9.)

Y. B. YOUNG FOR APPELLEE.

The infant's estate descended to his grandfather on the mother's side in preference to his uncles and aunts on the same side. (General Statutes, chapter 81, sections 1, 9.)

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The will of Ambrose Jones, of Bath county, devised his land to his widow for life, and the remainder to be equally divided between his four surviving children and the children of a deceased daughter. One of the children of the deceased daughter married Jerry Power, and died, leaving one child. The child died in infancy, and the question arises as to the manner of descent from the infant to its kindred. The infant had neither brother nor sister, but uncles and aunts on the mother's side, and also a grandfather on the mother's side. The court below held that the land passed to the grandfather.

The statute provides: "If an infant dies without issue having title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred, as hereinbefore directed, if there is any; and if none, then in like manner to the other parent, and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate, and their descendants." (General Statutes, chapter 31, section 9.)

By this express provision of the statute, the child dying under age and having derived title to the land from the mother, the estate passes to the kindred on the mother's side, and the maternal grandfather, surviving the infant, inherited the estate. The maternal kindred of the child took the estate, and not those who were the next of kin to its great-

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grandfather, the devisor from whom the mother derived the estate. It is not a question as to how or from whom the mother of the infant obtained the title. If the mother was invested with such an estate in the realty, as passed from her at her death to her child, and the child dies in infancy, the realty passes to its kindred on the mother's side, if not more remote than the grandfather, grandmother, uncles and aunts.

The judgment of the court below being in accordance with this view of the question presented, must be affirmed.

DECISIONS
OF THE
COURT OF APPEALS OF KENTUCKY.

SEPTEMBER TERM, 1885.

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CASE 27—INDICTMENT—SEPTEMBER 12, 1885.

Frey v. Commonwealth.

APPEAL FROM LOGAN CIRCUIT COURT.

AIDERS AND ABETTERS can not be indicted or punished under a statute which creates a felony, unless the statute applies to all who are guilty, and not alone to the person actually committing the acts constituting the offense.

Under the statute which provides for the confinement in the penitentiary of "any woman" who shall endeavor to conceal the birth of her bastard child, aiders and abettors can not be punished.

J. S. GOLLADAY FOR APPELLANT.

1. Where the punishment imposed by a statute is upon the person alone committing the offense, and not in general terms upon those who are guilty, mere aiders and abettors are not within the act. (Stamper v. Commonwealth, 7 Bush, 613.)
2. The indictment is bad, because it does not charge the guilt of the principal except inferentially. (Tully v. Commonwealth, 11 Bush, 154.)
3. The statute contemplates a *physical* concealment of the bastard child, and the indictment is not good because it fails to charge such a concealment. (General Statutes, chapter 29, article 4, section 14.)
4. The charge that the defendant "concealed" the birth of the child by "secreting" it, is a conclusion of law. (Foster v. Commonwealth, 12 Bush, 878.)

R. H. ALLENSWORTH ON SAME SIDE.

Frey v. Commonwealth.

P. W. HARDIN FOR APPELLEE.

All accessories in felonies are punishable as principals. (General Statutes, chapter 29, article 1, section 10.)

The indictment against appellant charged him with the offense of "aiding and abetting" another person, a woman, in endeavoring to conceal the birth of her bastard child. Under this indictment appellant was convicted and sentenced to the penitentiary for three years. From that judgment this appeal was prosecuted.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

If the rule laid down in *Stamper v. The Commonwealth*, 7 Bush, 613, is to be followed, the judgment of conviction in the present case must be reversed. Where a statute creates a felony, and annexes a punishment common to all persons who may be guilty of the offense, those aiding or abetting in the perpetration of the crime are included in the statute, and may be indicted. This is the rule of the common law, and was recognized as the correct doctrine in the case referred to. The punishment fixed by the statute in this class of cases is imposed on the woman concealing, or endeavoring to conceal, the birth of her bastard child, so as it could not well be ascertained whether the child was born dead or alive. In such cases, and for the purpose of preventing the mother from concealing the evidence of her shame by destroying her offspring, it is provided that, when guilty of the offense, "she (the mother) shall be confined in the penitentiary not less than one nor more than five years." The punishment was intended to apply alone to the mother, the statute providing: "If any woman be delivered of any issue of her body, which being born alive would be a bastard, shall endeavor privately, by

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drowning or secretly burying the same, or in any other way, directly or indirectly, to conceal the birth thereof, so that it may not be known whether it were born alive or not, she shall be confined," etc.

An aider or abettor, if the child was born alive and concealed so that death ensued, would be guilty of murder as well as the mother; but the difficulty in determining the question as to whether the child was or not born alive, induced the passage of the statute inflicting a punishment on the mother who endeavors to conceal its birth.

Section 10, article 1, chapter 29, General Statutes, making accessories before the fact liable as principals, was designed to apply only in cases where the offense existed at the common law, or where created by statute, applies to all who are guilty. The father of a bastard child concealing it is not amenable to the statute, but would be subjected to a greater punishment if the concealment, or the attempt to conceal its birth, caused its death. Stamper was indicted for malicious shooting and wounding another, without causing death. The statute made it a felony, but the court held that, being present aiding and abetting only in the shooting, the actual perpetrator of the offense could alone be convicted under the statute. That statute provided that "if any *person* shall willfully or maliciously shoot at, etc., he shall be confined in the penitentiary not less than one nor more than five years." That decision having been the recognized rule in this State for so long a period, it is unnecessary now to inquire whether or not that decision was a proper solution of the question involved in this case.

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While the decided preponderance of the testimony favors the innocence of the accused, this court has no power to disturb the verdict upon that ground. The jury and the trial court, where there is any evidence of guilt, are the sole judges upon the issue of fact.

For the reason indicated the judgment below is reversed, with directions to dismiss the indictment.

CASE 28—INDICTMENT—SEPTEMBER 17.

Vowells v. Commonwealth.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. CRIMINAL LAW.—SETTING UP FARO-BANK.—One can not be convicted of the offense of setting up a faro-bank, unless it appears that he was connected with the bank either as proprietor or as employe; a mere spectator rendering "a momentary or occasional assistance" can not be convicted.

It was error in this case to instruct the jury that they should convict if they believed the defendant "was aiding or assisting" the dealer "so as to keep and exhibit said faro-bank."

2. A PLEA OF FORMER ACQUITTAL OR CONVICTION need not be traversed by the Commonwealth.
3. THE BURDEN IS ON THE ACCUSED pleading former acquittal or conviction to show that he has been acquitted or convicted of the identical offense for which he is being tried.
4. REVERSIBLE ERROR.—That there was not *sufficient* evidence to sustain the verdict is not a reversible error in a criminal case. The only inquiry as to the evidence that can be made upon appeal is, whether there was *any* evidence conducing to show guilt.

HUGH RODMAN AND HAYCRAFT & SLACK FOR APPELLANT.

Brief not in record.

P. W. HARDIN FOR APPELLEE.

1. The Commonwealth is not required to traverse a plea of former conviction or acquittal. (Criminal Code, section 172.)
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136	512

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132	672

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2. The sufficiency of the evidence to support the verdict can not be considered. (Criminal Code, section 281.)
3. The instructions present clearly the law of the case.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant was indicted for the offense of setting up a faro-bank under section 6, article 1, chapter 47, General Statutes, and now relies upon various grounds for reversing the judgment of conviction.

1st. It is contended the court erred in giving any instruction at all upon the hypothesis of his guilt, because there was a total absence of proof showing or tending to show it.

The only witness who testified to any facts relating to the offense of which appellant was convicted was Johnson. He stated, in substance, that in July, 1882, a short time before the indictment was found, he was in a room where one McCarty was dealing faro, and that he, the witness, and another were betting against the game, appellant being, at the time, in the lookout chair; that McCarty, the dealer, and the other better got into a fuss about the limit, when appellant took up the dispute, and the witness left because he feared a difficulty, and in a few hours thereafter he was called before the grand jury and testified about it. He stated that the lookout is to protect the game; two persons, the dealer and lookout, being sometimes required to run it.

On the other hand, the witness stated he did not know that appellant had any thing to do with the game; that a good dealer, such as McCarty, did not require the help of a lookout, and that he, the witness, had seen a great many men in the lookout.

chair, when faro was being dealt, and watch the game who had nothing to do with it.

As has been often held, this court has no power to reverse a judgment of conviction in a criminal case upon the sole ground there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry, whether there was any evidence before the jury conducing to show the guilt of the accused; and as, in our opinion, there was some evidence, we do not feel authorized to invade the province of the jury.

2d. In addition to the plea of not guilty, appellant entered a plea of former conviction and of former acquittal. And his counsel now contends that because no reply to either plea was filed by the Commonwealth, nor any formal issue of record made, he was entitled to an acquittal in this case.

The Criminal Code, by which alone pleadings and proceedings in criminal trials are regulated, provides for a plea of former acquittal and of former conviction of the offense charged in the indictment. But it is not required in such case that there shall be a reply by the Commonwealth, nor has it ever been held by this court to be necessary under the Code.

There was evidence introduced on the trial showing that appellant had been twice before indicted and tried for similar offenses, being convicted under one and acquitted under the other indictment. But to avail himself of such defense, we think it was incumbent on him to show that he had been previously tried and convicted or acquitted, as the case may be, of the identical offense for which he was

indicted in this case. For, while former conviction or acquittal may, under the Code, be pleaded with or without the plea of not guilty, it is essentially an affirmative plea and puts the onus upon the accused. The instruction given by the court in accordance with this view, of which counsel complains, was, therefore, not erroneous. Nor was appellant prejudiced by the failure of the court to specify in the instructions the case in which he was tried and acquitted, as was done in the case where he had been tried and convicted. For the evidence shows clearly that both the indictments and trials under them, pleaded in bar, were for offenses distinct from the one of which he was convicted in this case.

3d. The most serious question in the case is as to the correctness of the instruction given and the one refused, which we quote.

The one given is as follows: "If the jury find that another person was setting up, exhibiting or keeping a faro-bank, by dealing faro, and that defendant was aiding or assisting such dealer, so as to keep and exhibit said faro-bank, the jury will find the defendant guilty," etc.

The one refused is as follows: "Before defendant can be found guilty of the offense charged, the jury must believe, from the evidence, that he was in some way connected with the faro-bank and not a mere spectator."

We have no doubt that under the statute a person may be guilty of the offense who aids or assists the dealer, or the person setting up or keeping a faro-bank. But we think it is essential to his legal con-

viction that he should be proved to have been more than a mere spectator, or, in other words, that he was in some way connected with the game as a joint owner or employe.

In the case of the Commonwealth v. Burns, 4 J. J. Marshall, 177, the statute of 1823, not materially differing from the section of the General Statutes under consideration, was construed by this court. In that case Burns was shown to have been present while another was dealing faro, and during the game took a seat and aided in conducting the game, paying off bets lost by the bank, and taking in those won by it; and in the opinion rendered, affirming the judgment, this court used this language: "Does a person set up or keep a gaming table who has no interest whatever in it, nor any agency in it, or the game which shall be played upon it, other than a momentary or occasional assistance to the dealer in taking in or paying bets? He does not either, according to the letter or object of the statute, or to the popular understanding of the terms, set up or keep a gaming table. The letter of the act does not embrace him; its policy can not. Such a person could not, therefore, keep a bank, nor be guilty of setting it up, directly or indirectly, because he had no interest in it."

We do not think it necessary, in order to establish the guilt of the accused in such case as this, that he should be proved to have had an actual pecuniary interest as owner of the bank. It is sufficient, if it appear that he was connected with it either as proprietor or as dealer or other employe.

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He must be more than a mere spectator, rendering "a momentary or occasional assistance."

The question then arises, whether the words "was aiding or assisting such dealer, so as to keep and exhibit said faro-bank," contained in the instruction of the court, import definitely and fully the idea of such a connection by appellant with the faro-bank as makes him amenable under the statute? We think not. For, as held in the Burns case, a mere spectator, having no interest in or connection with the faro-bank as owner or employe, might aid or assist the dealer, "so as to keep and exhibit it" for the time being, without being guilty of the offense denounced by the statute.

In our opinion, the instruction given by the court does not sufficiently or accurately describe the offense with which appellant is charged, and it should have been qualified and explained by the one asked by appellant, and improperly refused, which we have quoted. For this error the judgment is reversed for a new trial.

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CASE 29—PETITION EQUITY—SEPTEMBER 17.

Sullivan, &c., v. Berry's Adm'r.

APPEAL FROM WHITLEY CIRCUIT COURT.

1. CONSTITUTIONAL LAW—JUDICIAL SALES—REDEMPTION.—The constitutionality of a statute can not be questioned upon the ground that the statute impairs the obligation of contracts, unless the rights of the person raising the question have been invaded by the statute.

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Therefore, although the statute which provides for the redemption of property sold by commissioner under decree is, as between the debtor and his creditor, unconstitutional, in so far as it applies to sales for debts created prior to the enactment of the statute, the purchaser at such a sale can not complain that the statute is unconstitutional, and object to the sale of the equity of redemption upon that ground, as the obligation of no contract was impaired by the statute so far as he is concerned.

2. PREJUDICIAL ERROR.—A purchaser of land at judicial sale is not prejudiced by the failure to describe the land in an order for the sale of the equity of redemption, even if such an omission be error.

JOHN L. SCOTT AND JOHN SMITH FOR APPELLANTS.

1. The act of April 9, 1878, providing for the redemption of lands sold under decree is unconstitutional in so far as it applies to sales for debts created prior to the passage of the act. (Constitution of United States, article 1, subsection 1; *Thweatt, &c., v. Bank of Hopkinsville*, 81 Ky.)
2. In petition for rehearing counsel contend that all unconstitutional acts are *void* and not merely voidable, and cite: *Bouvier's Law Dictionary*, vol. 2, word "Unconstitutional;" *Kent's Commentaries*, vol. 1, pages 457-8; *Dartmouth College v. Woodward*, 4 Wheaton, 518; *Fletcher v. Peck*, 6 Cranch, 87; *Rapalje's Law Dictionary*, words "Unconstitutional," "Void" and "Voidable;" *Grayson v. Lilly, &c.*, 7 Mon., 11; *Lapsley v. Brashears*, 4 Litt., 84; *Ogden v. Saunders*, 12 Wheaton, 218; *Blair v. Williams*, 4 Litt., 47; *Berry v. Ransdall*, 4 Met., 294; *Hepburn v. Griswold*, 2 Duv., 44; *Auditor v. Adams*, 13 B. M., 159; *Garrard v. Nutall*, 2 Met., 107; *Auditor v. Cochran*, 9 Bush, 9; *Kibby v. Jones*, 7 Bush, 244; *Pearce v. Patton*, 7 B. M., 168; *Turnpike Road Co. v. Ballard*, 2 Met., 169; *Head v. Ward*, 1 J. J. M., 284; *Constitution of Ky.*, article 18, section 80; *Stidger v. Rodgers*, *Sneed's Rep.*, 52; *Enderman v. Ashby*, *Ibid.*, 53; *Bliss v. Commonwealth*, 2 Litt., 94; *Terrell v. Rankin*, 2 Bush, 461.)

C. W. LESTER FOR APPELLEE.

Whether or not a right of redemption *in fact* existed, appellants have no right to complain, as they bought knowing that the sale was being made subject to the debtor's right to redeem. Moreover, the act of April 9, 1878, does not impair any security which they had at the time of its passage, and they will not be heard to complain that it is unconstitutional.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

In this action to settle the estate of Nathan Law-

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son, deceased, a decree was entered in May, 1880, to sell the decedent's lands for the payment of debts created prior to the passage of the act of the Legislature of April 9, 1878, by which the redemption of land sold by a commissioner under a decree was authorized, when it did not bring two-thirds of its appraised value.

The judgment did not direct that it be sold subject to an equity of redemption; it is silent upon this point; and the commissioner, after having it properly appraised, sold it on July 19, 1880, the appellants becoming the purchasers at less than the indebtedness, and also at less than two-thirds of the appraised value. The sale was confirmed in October, 1880, but no deed has ever been made to them.

In May, 1881, another judgment was rendered, directing the sale of the equity of redemption; and under this judgment, to which the appellants objected, it was sold, and purchased by other parties.

The sale having been reported to the court, it was confirmed over the exceptions filed by the appellants, who objected to it and the decree under which it was made, upon the ground that the act *supra* was unconstitutional, so far as it, by its terms, was made applicable to debts created prior to its passage.

In the case of *Collins v. Collins*, 79 Ky., 88, this identical question arose, *but between the debtor and his creditor*; and it was held that the act was unconstitutional so far as it related to debts created prior to its passage.

The opinion was based upon the fact that it was

not a mere regulation of the *remedy*, but that it affected the *right* of the creditor; that it did not merely provide how the remedy should be employed, but that it decreased its value by providing that what was before an absolute sale should be but a conditional one; thus giving the debtor an equitable right which he did not have when the contract was made, and falling within the constitutional inhibition against laws impairing the obligation of contracts.

In this instance, however, neither the creditor nor the debtor is complaining. The sale of the equity of redemption benefited both, and aided to pay the indebtedness of an insolvent estate. The appellants purchased when they were bound to take notice of the law in question, and then, for the first time, acquired any right to the land or interest in the matter. The obligation of no contract was impaired, so far as they are concerned, which existed when the Legislature enacted the law. It is true that the law existing when a contract is made enters into it as an integral part of it; but this is available only to the parties to it, or those who become interested in the enforcement of the obligation arising out of it. The appellants were not parties to, nor had they any interest in, the indebtedness, which was created prior to the passage of the act, and which was enacted prior to their contract of purchase.

They are, therefore, not in a position to complain. The owner of a particular estate could as well be heard to complain that an act of the Legislature is unconstitutional, because it divests the remainderman of his right.

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Mr. Cooley, in his work on Constitutional Limitations, page 197, says: "*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid, and it is only when some person attempts to resist its operation and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the Legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers."

It is also urged that the judgment ordering the sale of the equity of redemption must be reversed because it does not describe the land.

It is true that a decree directing the sale of land should so describe it as to enable the commissioner to act without reference to any other paper or pleading in the case. In this instance the commissioner's report of the assets of the estate, and also the first judgment of sale, specifically describe the land; but the judgment ordering the sale of the equity of redemption simply says: "This court's master commissioner is hereby directed to make sale of the redemption in and to said land, same being described by metes and bounds in said former order, to which said court is referred for boundaries."

It had already given the date of said former judg-

ment; and waiving the question whether the last judgment should not be considered a continuation merely of the first one, and the land, therefore, sufficiently described, we are of the opinion that the appellants, as purchasers under the former decree, are not in a position to make this question.

Judgment affirmed.

JUDGE HOLT delivered the response of the court to petition for rehearing.

After a careful consideration of the petition for a rehearing and an examination of authorities, we think the opinion heretofore delivered is correct, both upon the merits and the law of this case.

The commissioner had the land appraised prior to the sale. This was certainly done in view of its redemption. It is to be presumed that the appellants knew that it had been done, and had notice of the record in his hands when the sale was made. They have said nothing to the contrary. The report of the sale stated that the land had been appraised before it was made, and the appraisement was returned with it.

Under these circumstances, it may fairly be presumed that the appellants, who purchased the property for less than two-thirds of its value, and who will, in any event, get back their money, bought it subject to a right of redemption. If they did not, it is singular that they have not said so.

The alarm of counsel at the opinion arises from a misapprehension of it. It is erroneously assumed

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that it holds that an unconstitutional legislative act is only *voidable* and not *void*. It is not based upon such a ground. This impression was doubtless created in the mind of counsel by these words, relating to an unconstitutional act, in the quotation in the opinion from Cooley's Constitutional Limitations: "Respect for the Legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not *void*, but *voidable* only." It is shown in the text that it is not the language of Judge Cooley; and the entire quotation, as given in the opinion, is that of Chief Justice Shaw, used in the case of *Wellington et al.*, 16 Pick., 87; but even it substantially says, that when the objection of unconstitutionality is properly presented and sustained, that then the act should be declared void.

The word "*voidable*" was doubtless used by the distinguished judge in the sense that the effect of an unconstitutional act may be avoided, by reason of its being void, by one who has a right to question it, the burden being upon him to show its unconstitutionality. He may have placed himself in such a position that he has no right to say that the act is invalid, or to ask the interposition of a court for this purpose. For instance, if it unconstitutionally encroaches upon some right belonging to him, but he procured or consented to its passage. An examination of the entire case supports this view of its meaning; and the view of Judge Cooley, as given in his own language, is: "The statute is assumed to be valid until some one complains whose rights it invades."

The Federal Constitution, as well as that of our own State, has forbidden our Legislature from enacting any law impairing the obligation of a contract; and section 30 of our Bill of Rights declares that all laws contrary to our Constitution are *void*.

It is urged by counsel that the word "unconstitutional" is the legal synonym of "void;" that a legislative act is either valid or void, and can not be avoidable; that if void, it is so *ab initio*, and as to strangers as well as interested parties, and for all purposes and under all circumstances; that no one can gain or lose a right by it, nor is any one bound by it, because the Legislature had no power to pass it, and it has no legal effect. Without dissenting from these views, or being understood as fully adopting them in the broad sense in which they are stated, we will state more fully the ground for an affirmance in this case.

The act of April 9, 1878, was in the case of Collins v. Collins, 79 Ky., 88, where the question arose between the debtor and the creditor, or the parties to the original contract, held to be unconstitutional so far as it gave the debtor a right of redemption as to sales of his land made after its passage for debts created prior thereto, upon the sole ground that it impaired the obligation of the contract. The entire right of the appellants arises out of their contract of purchase, made subsequent to the passage of the act in question, and not out of the contract made when the debt for which the land was sold was created. They were not parties to the latter, nor interested in the enforcement of the obligation

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growing out of it. Their right to the land was acquired under the law in force when they purchased, and the then existing law enters into their contract.

Strange as it may now seem, it was for a long time doubted whether the courts of this country had the power to declare an act of a Legislature unconstitutional; and at least two examples can be found in our judicial history where judges have been impeached for so doing. It is a delicate and important duty, but a necessary one, because, as the Constitution is the fundamental law, it must be determined whether legislative action is in conformity to it. It should be performed, however, with the utmost caution and deliberation, and with a proper respect for the law-making power. Its action should not be held invalid unless it is so beyond reasonable doubt; and it is then so done, not because of judicial supremacy over a co-ordinate branch of the government, but because the law must be declared and the fundamental law maintained.

It results naturally from these considerations that a court will not listen to an objection to the constitutionality of an act, if it comes from one who is not interested or who has no right to make it; that it will not even pass upon such a question, unless it is the *lis mota*, and necessary to its decision, and will not go out of its way to find such a question.

It was said in the case of Jones, &c., v. Black, &c., 48 Ala., 540: "Nor will a court listen to an objection made to the constitutionality of an act of the Legislature by a party whose rights it does not specially affect. An act of the Legislature will

be assumed to be valid until some one complains whose rights it invades; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of constitutionality can be presented and sustained."

To the same effect are the cases of *Williamson v. Carlton*, 51 Me., 449; *Dejarnette v. Haynes*, 23 Miss., 600; and *Turnpike Corp. v. County of Norfolk, &c.*, 6 Allen, 353.

The claim of the appellants is based alone upon a contract of purchase made subsequent to April 9, 1878, and when the act in question was in force. There is no such connection between their contract and the one made when the debt was created, as to give them any rights under the latter; and they can not be heard to say that the law is unconstitutional because it impairs the obligation of a contract to which they were not parties, and the obligation of which they were in no way or to any extent entitled to enforce.

The petition for a rehearing is overruled.

McKean v. Brown.

CASE 80—PETITION EQUITY—SEPTEMBER 24.

McKean v. Brown.

APPEAL FROM WHITLEY CIRCUIT COURT.

1. A DIVORCE BARS ALL CLAIM OF THE WIFE TO DOWER, as well in land conveyed by the husband during the existence of the marital relation as in that of which he may die possessed.
2. PLEADING.—In an action to recover dower the plaintiff's allegation that she had been divorced from her husband can not be construed as meaning that she had been divorced from bed and board only.

C. W. LESTER FOR APPELLANT.

A divorce does not bar the wife's claim to dower in any land of which the husband was possessed during the existence of the marriage relation. (Rich v. Rich, 7 Bush, 58.)

R. D. HILL FOR APPELLEE.

1. "A divorce bars all claim to curtesy or dower." The statute makes no exception. (General Statutes, chapter 52, article 4, section 14.)
2. The appellant's petition failing to allege the character of divorce, the presumption is that it was a divorce from the bonds of matrimony.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant, Elizabeth McKean, is seeking to recover dower in a tract of land owned by the appellee, Brown, alleging that on the 25th of September, 1870, she was the wife of the grantor, Hiram McKean, who was the owner in fee of the land, and after the marriage sold and conveyed it to the appellee. It is also alleged in the petition that at the death of Hiram McKean the appellant was not his wife, but had obtained a divorce from him several years prior thereto. A demurrer was sustained to the petition, and the appellant asks a reversal, because the judgment for a divorce does not bar such a recovery where the marital relation existed at the time of

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the conveyance. The statute makes no such exception, but provides that "a divorce bars all claim to curtesy or dower." (General Statutes, chapter 52, article 4, section 14.)

The wife had no vested interest in the husband's lands during the coverture, and at his death, the marriage relation having been dissolved by the Chancellor, it can not be said that as the survivor she is entitled to dower in the land conveyed while she was the wife of the grantor, and at the same time denied the right to dower in the land of which he died possessed. At his death the appellant was not his wife or widow, and, therefore, has no interest in his estate.

It is urged that the statement in the petition, that she had been divorced from her husband, should be construed as meaning that she was divorced from bed and board only. Such a construction would not only favor the pleader, but is in direct conflict with appellant's own averment, viz: "That she was not the wife of McKean at the time of his death, having been divorced from him several years before."

Judgment affirmed.

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Louisville and Nashville Railroad Company v. Brice.

CASE 31—MOTION—SEPTEMBER 26.

Louisville and Nashville Railroad Company v. Brice.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

1. **APPEALS—SCHEDULE.**—Since the repeal of so much of the Code as required errors to be assigned, the failure of the appellant to file a schedule is not a ground for dismissing the appeal when he has filed the entire record in proper time.

Where a partial transcript is desired a schedule must be filed with the clerk of the court below within ninety days after the granting of the appeal, and the filing of the schedule is sufficient notice to the appellee. This rule applies as well to appeals involving the settlement of estates as in ordinary cases, the judge being no longer required to direct the parts of the record to be copied.

2. **IF A CROSS-APPEAL IS DESIRED** the appellee may file his schedule below, either before or after the schedule is filed by the appellant.

E. P. CAMPBELL, JOHN W. MCPHERSON AND HARRY FERGUSON FOR APPELLEE.

Cited, in support of motion, Civil Code, section 737, subsection 4; Hawthorne v. McArthur, 7 Ky. Law Rep., 39.

W. LINDSAY FOR APPELLANT, IN RESPONSE TO MOTION.

1. Since the repeal of so much of the Code as required errors to be assigned, the failure to file a schedule is not ground for dismissal where the appellant has brought up the entire record.
2. It is in the discretion of the court as to whether or not it will dismiss for the failure to file a schedule. (Civil Code, section 737, subsection 4; *Ibid.*, section 740.)

JOHN FELAND ON SAME SIDE.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The question of practice to be determined in this case arises from a motion made by the appellee, Brice, to dismiss the appeal of the railroad company, because it failed to file with the clerk of the inferior court a schedule, showing what part of the

record it desired for this Court, within ninety days after the granting of the appeal.

The act of the Legislature of April 4, 1884, repealed so much of the Code of Practice as required an assignment of errors. Prior to this repealing act the appellant was required, within ninety days after the granting of the appeal, to file in the office of the clerk of the inferior court *his assignment of errors and a schedule* showing concisely what parts of the record he wished to have copied. "His failure to file said *assignment and schedule*" within the time prescribed shall be cause for the dismissal of the appeal. After the filing of his assignment and schedule, it is provided that appellant *may* cause notice of the filing thereof to be served on the appellee. (Civil Code, section 737, subsection 4.)

By subsection 2 of the same section (737) it is provided that in cases to which the provisions of chapter 3 of title 10 apply, the appellant, whether the appeal be granted by the inferior court or by the clerk of the Court of Appeals, "shall present to the judge of the inferior court his assignment of errors; the judge shall, by directions thereon or annexed to the assignment, order the clerk of the inferior court to copy such specified parts of the record as, in view of the alleged errors, may be material, and the appellant shall file said assignment and directions in the office of the said last-mentioned clerk." The provisions of chapter 3, title 10, to which subsection 2 of section 737 applies, relate to the settlement of estates, etc.

As the appellant is no longer required to file his assignment of errors, these various provisions of the

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Code have been referred to with a view of determining how a party appellant is to reach this court with his record, where the appeal is prayed below.

The repeal of so much of the Code as required the assignment of errors renders it impossible, and certainly impracticable, for the judge, without an assignment of errors, to direct what part of the record should be copied, in view of the alleged errors, because none are required to be assigned. So that so much of the Code as requires the judge to direct what part of the record is to be copied must be regarded as repealed.

The object in requiring the filing of an assignment of errors within ninety days, with a schedule, was to enable the appellee to know the ground relied on for a reversal, so that he might prepare his schedule and assign cross-errors, or if he did not desire to file cross-errors, that he might have other parts of the record brought to this court than that ordered by the appellant.

All that part of the act in regard to the assignment of errors being repealed, it seems to us the only question to be determined is, can the party bring the entire record to this court without filing a schedule with the clerk below? That he may still bring a part of the record, by filing his schedule within the ninety days from the time he prays the appeal, is manifest, and the filing of his schedule is all the notice required; but as he alone is to be benefited by filing such a schedule, we see no reason for inflicting a penalty upon him for bringing the entire record to this court.

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If he brings more of the record here than is necessary, the penalty is the payment of costs for so much of the record as may not be required for the settlement of the questions involved. When the appellant failed to file his assignment of errors and schedule, the penalty was a dismissal of the appeal; but as this is not now required, and the bringing of a partial record here is for the benefit of the party appealing, if the latter sees proper not to avail himself of this provision of the Code, it constitutes no reason for dismissing his appeal. As we construe the Code, the appellant is required to file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of this court next after granting the appeal, unless the court extend the time. (Section 738.)

He may file a partial transcript in this court, or the entire record, within the time prescribed by section 738, with this exception. He will not be allowed to file a partial record unless he has filed his schedule within ninety days after praying his appeal in the court below. The filing of the schedule with the clerk shall be sufficient notice to the appellee. It is as easy for the appellee to ascertain whether a partial record is desired by the appellant, by applying to the clerk, as it is to ascertain whether a complete record has been filed in this court.

This rule of practice applies as well to appeals involving the settlement of estates as in ordinary cases. The schedule, when a partial record is desired, must be filed with the clerk of the court be-

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low within ninety days from the granting of the appeal in all cases. The appellee, if he desires to pray a cross-appeal in this court, may file his schedule in the court below either before or after the schedule is filed by the appellant. Since the repeal of so much of the Code as required errors to be assigned, there is no necessity or reason for dismissing the appeal when the appellant is here in proper time with the entire record.

The motion to dismiss is overruled.

CASE 32—PETITION EQUITY—SEPTEMBER 26.

Redman v. Forman.

APPEAL FROM CLARK CIRCUIT COURT.

1. **WATER-COURSES.**—The owner of land has the right to use for his own purposes that which is beneath the soil, whether rock or water, where there is no intent to injure the adjoining owner.

As to running surface water, the owner can appropriate it to his own use, but he can not so divert it as to prevent its use by those below him, and even where the water is running underground, if it flows in a natural channel known and ascertained by those deriving its benefits, it can not be diverted to the injury of the riparian proprietors.

2. **CASE ADJUDGED.**—Appellant and appellee owned adjoining lands, and appellee had been using water that ran from a spring on appellant's land into a pool on his (appellee's) side of the line, from which he watered his stock. Although partially a subterranean vein, its course was well defined, and for years running in the same channel, a distance of only a few feet, from one farm to the other.

Held—That it was error to enjoin appellant from interfering altogether with the flow of water from the spring. He is entitled to the reasonable use of it for the purpose of supplying his stock

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with water and for all the purposes common to such a farm, and if he enlarges the spring for that purpose, and his stock consumes the water and deprives appellee of its use, appellee can not complain.

3. **ASSIGNMENT OF ERRORS.**—That “the court erred in perpetuating the injunction” was a sufficient assignment of error in this case.

W. M. BECKNER FOR APPELLANT.

The owner of the soil may use as he pleases what is below the surface, and if he chooses to cut off a spring of water below the surface his neighbor has no right to complain, although he may be damaged thereby. The law recognizes a distinction between a supply of water which comes from an underground vein, and a stream which flows on the surface, or a stream under the surface so well defined and strong as to become a water-course. (*Roath v. Driscoll*, 20 Conn., 539; *Thurston v. Hancock*, 12 Mass., 230; *Greenleaf v. Francis*, 18 Pick., 117; *Chase v. Silverstone*, 62 Maine, 175; *Clark v. Estate of Conroe*, 38 Vt., 473; *Chatfield v. Wilson*, 28 Vt., 49; *Ellis v. Duncan*, 21 Barb., 230; *Wheatley v. Baugh*, 25 Pa. St., 528; *Frazier v. Brown*, 12 Ohio St., 298; *Brown v. Illinois*, 25 Conn., 593; *Haldeman v. Bruckhardt*, 45 Pa. St., 518; *Chesley v. King*, 74 Maine, 164; *Brain v. Marfell*, 20 Am. Law Reg., 98; *Domat's Civil Law*, sections 1047, 1581; *Acton v. Blundell*, 12 M. & W., 324; *Chaseman v. Richards*, 7 H. L. Cases, 849.)

RODNEY HAGGARD AND L. H. JONES FOR APPELLEE.

Brief not in record.

A. DUVALL ON SAME SIDE, IN PETITION FOR REHEARING.

Both the pleadings and the proof show that the spring in controversy is on appellee's land, and, therefore, appellant was properly enjoined from digging down to the subterranean vein and cutting off the supply of water therefrom.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant and appellee own adjoining lands in the county of Clark, and the appellee had been using the water that ran from a spring on appellant's land that emptied into and filled a pool on appellee's side of the line, and from which the latter watered his stock. The appellant purchased his land of one Groom, and while Groom was the owner, by the consent of the appellee, a pool was made

large enough to embrace a portion of the land belonging to each of the adjoining owners; but finding that the spring would not supply both farms with water, Groom filled up his end of the pool, constructing a passway over it, leaving a culvert under it so as the water from the spring could pursue its natural channel or course into the pool of the appellee. Although partially a subterranean vein, its course was well defined and for years running in the same channel, a distance of only a few feet, from the one farm to the other, supplying the appellee with water for his stock.

The appellant undertook to dig or re-open the pool filled up by Groom, his vendor, with the avowed purpose, as is alleged, of diverting the flow of water into appellee's pool, the effect of which would be to deprive the appellee entirely of water from this spring. Upon the issue formed there was some conflict in the testimony.

The right of property that every one has in his own land gives to him the right to use that which is beneath the soil for his own purposes; and where there is no intent to injure the adjoining owner he has the right to appropriate what is beneath the land for his own purposes, whether rock or water. As to running surface water, the owner can only appropriate it to his own use, and even then he can not so divert it as to prevent its use by those below him; and where the water is running under ground and flowing in a natural channel, known and ascertained by those deriving its benefits, it can not be diverted to the injury of the riparian proprietors.

This doctrine seems to be recognized by the elementary writers on the subject and the adjudged cases. (Washburn on Servitudes and Easements, and the cases cited, pages 448, 449.)

While the construction of the work by the appellant in opening a new pool may have been in the exercise of a proprietary right, still he can not proceed in such a manner as to deprive the appellee of the use of the water flowing from his spring, unless, by its reasonable use, the appellant consumes it all. It has been running into appellee's pool for years, through a well defined channel known to both the adjacent owners, and its diversion, so as to deprive appellee entirely of its use, must necessarily work an injury to him.

The injunction in this case, however, is too comprehensive in its effect upon the rights of the appellant, and, in effect, prevents him from the use of the water in any way. The spring from which the water flows is upon the premises of the appellant. He has no other water upon that part of the farm, or if he has, the injunction prohibits him from interfering with the flow of water from the spring in any way whatever. We see no reason why the appellee should be entitled to the exclusive use of this spring, located upon appellant's land. Appellant is certainly entitled to the reasonable use of it, for the purpose of supplying his stock with water and for all the purposes common to such a farm.

While the digging of the pool might lessen the supply and stop, to some extent, the running of the

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water, the effect of the injunction is to deprive the appellant of any right to its use, that the pool of the appellee may be kept filled. If the appellee should fill up his pool the supply on his land from the spring might not be so great, or at least the appellant, who owns the land and the spring, might be enabled to use more of the water for his own purposes. The right to the water is not asserted under any contract with the appellant, or any right to its use so vested in the appellee as to deprive the appellant of the right to open the spring, or to enlarge it for his own use. He is entitled to its reasonable use, and if he enlarges the spring for that purpose, and his stock consumes the water and deprives appellee of its use, it is, so far as the latter is concerned, *damnum absque injuria*.

The judgment perpetuating the injunction must be reversed and cause remanded, with directions to enjoin the plaintiff from diverting or from changing the natural flow of water from his spring, for the purpose of preventing its running into appellee's pool, but not to prohibit appellant from enlarging his spring, or using the water therefrom, for the ordinary purposes of his farm.

The claim of the appellee is, that if the spring is enlarged and used by the appellant for stock water that it lessens the supply for him; and, therefore, he asks that the owner of the soil and the spring be prevented from its use. While the flow of water may be stopped, in the event the spring is enlarged by the appellant, until the spring is filled, still, if when full, it runs its usual course, it is the ex-

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exercise of a proprietary right that belongs to the appellant.

That the court erred in rendering the judgment, or in perpetuating the injunction, is a sufficient assignment. It requires a decision on the merits.

CASE 83—PETITION EQUITY—SEPTEMBER 26.

Bank of Louisville v. Board of Trustees of Public Schools.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. CONSTITUTIONAL LAW—ESCHEATS.—An act of the Legislature, approved April 22, 1882, provides that money on deposit, the last owner of which has not been heard of for eight years, shall vest in the Commonwealth: *Provided*, That property in the city of Louisville "subject to escheat to the Commonwealth" shall vest in the Board of Trustees of the Public Schools of said city. The act further provides that money thus paid into the Treasury shall be reimbursed to the owner upon proper proceedings: *Provided*, The Board of Trustees of the Public Schools, and not the State, shall be liable for money paid to the former.

Held—That this act is unconstitutional in so far as it provides that *all* such deposits shall vest in the Board of Trustees of the Public Schools, as it, in that respect, impairs the obligation of contracts. The act, however, is constitutional in so far as it vests in the Board of Trustees of the Public Schools such deposits as are subject to escheat to the Commonwealth under section 1, article 1, chapter 86, of the General Statutes.

2. PRESUMPTION OF DEATH.—Our statute, which provides that death shall be presumed after an absence from the State for seven successive years, unless proof be made that the person was alive within that time, was not intended to exclude all presumptive evidence of death where it does not appear that the party left the State.

In this case, the non-appearance of depositors at a bank for twenty years and the non-claimer by them of their deposits, are circumstances sufficient to raise a presumption of death.

83	219
86	151
83	219
118	982

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8. **EXISTENCE OF HEIRS PRESUMED.**—Whether long-continued absence will raise the presumption of death *without issue*, must depend upon the circumstances of each particular case; but the legal presumption is that a person leaves *heirs*, either near or remote, and where the testimony is merely negative, and relates to mere absence only, it is insufficient to raise the presumption that the person died intestate, and without *heirs*.

HAMILTON POPE FOR APPELLANT.

1. The amended petition should have been stricken from the files because it sets up a new cause of action, and is a departure from the original petition. (Taylor v. Moran, 4 Met., 130; Brookover v. Hurst, 1 Met., 669; Swan v. Goodwin, 2 Duv., 300.)
2. The act under which appellee seeks to recover is unconstitutional, because it deprives the bank of its right to hold, and the depositors of their right to demand, their money, and therein impairs the obligation of contracts. (Henderson & L. S. R. Co. v. Dickerson, 17 B. M., 177; McKinney v. Carroll, 5 Mon., 98; Lapsley v. Brashear, 4 Litt., 34-39; Grayson v. Lilly, 7 Mon., 10; Blair v. Williams, 4 Litt., 46; Wilson v. Churchill, 5 Dana, 385; Davis v. Ballard, 1 J. J. Mar., 563; Graves, &c., v. Buford, 1 Dana, 491; Sutton's Heirs v. City, 5 Dana, 33; Smith's Commentaries on Constitutional Construction, 174, 253, 262, 347-8, 363; Cooley's Const. Limit., pages 90-1, 165-6; Const. of Ky., article 13, sections 3, 20; Morse on Banking, 32-3.)
3. The fact that a person has not been heard of for seven years does not raise the presumption that he is dead, unless it appears that he left the State. (General Statutes, chapter 37, section 16; Spurr, etc., v. Trimble, etc., 1 A. K. Marsh., 206.)
4. The burden of proving the death of a person is upon those who set it up. Mere absence is not enough to prove death. (Barney v. Ball, 24 Ga., 505; Emerson v. White, 29 N. H., 482; Asbury v. Sanders, 8 Cal., 62; Gilliland v. Marlow, 3 McLean, 490.)
5. Even if the death of the depositors be presumed, it can not be presumed that they died intestate and without heirs. (Gray v. McDowell, 6 Bush, 482.)

RANDOLPH H. BLAIN FOR APPELLEE.

1. The act under which appellee claims does not impair the obligation of contracts. (Acts 1881, volume 1, page 108; Const. of Kentucky, article 13, section 20; Blair v. Williams, 4 Litt., 36; Lapsley v. Brashear, *Ibid.*, 54; Bronson v. Kensie, 1 Howard, 316; McCracken v. Hayward, 2 How., 612; Ogden v. Sanders, 12 Wheat., 259; Story on Const., 1380; Cooley's Const. Lim., 286; Sedgwick on Construction of Statutes, 630.)
2. The contract between bank and depositor is one of common debtor

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- and creditor. (Addison on Contracts, section 817; Morse on Banks, page 28; *Curtis v. Leavitt*, 15 N. Y., 9; *National Bank v. Elliott Bank*, 20 L. R., 188; *Keene v. Collier*, 1 Met., 417.)
3. The act does not divest vested rights without due process of law.
 - a. As to what is "due process of law." (*Cooley on Const. Lim.*, 352, 353, 356, 390; *Dartmouth College v. Woodward*, 4 Wheat., 519; *Varden v. Mount*, 78 Ky., 89; *Joyce v. Woods*, *Ibid.*, 386.)
 - b. As to the vested rights of the bank. (Morse on Banks, pages 40-42; *Adams v. Orange Co. Bank*, 17 Wend., 514; Acts 1869, volume 1, page 41; *Cooley on Const. Limit.*, 370.)
 - c. As to the right of the bank, by reason of the fact that the depositors may re-appear. (*Newman v. Jenkins*, 11 Pick., 515; *Rowe v. Hasland*, 1 Wm. Bl., 404; *Olmstead's Appeal*, 86 Pa. St., 285; *Starr v. York Nat. Bank*, 55 Pa., 364; *Frazier v. Erie Bank*, 8 W. & S., 20.)
 - d. As to the interest of the depositor. (*Kent's Com.*, volume 4, page 427; General Statutes, section 7, page 408; *Burgess v. Wheat*, 1 Wm. Bl., 133.)
 - e. The act provides that title by abandonment shall be found by a court of equity. This is a judicial finding, and is equivalent to office found. (*Burgess v. Wheat*, 1 Wm. Bl., 130; *Fairfax v. Hunter*, 7 Cranch, 604; *United States v. Repentigny*, 5 Wal., 267-8; *Beaune v. Hunter*, 9 Wal., 387.)
 4. The act does not take private property for public use. (General Statutes, section 14, page 121; *Sedgwick on Const. of Statutes*, pages 423, 443, 456; *Board of Trustees, &c., v. Auditor*, 80 Ky., 341.)
 5. The act vests in the State title to abandoned property which was before vested in it by the common law. (2 Bl. Com., pages 8, 9, 14, 15; 1 Wm. Bl., 133-141; 4 Kent's Com., page 426; *Barclay v. Russell*, 8 Vesey, 424; *Commonwealth v. Blanton*, Ex'r, 2 B. M., 397; *Middleton v. Spicer*, Brown's Ch'y Rep., 201.)
 6. The act establishes a rule of evidence by which to determine abandonment, which is neither arbitrary nor uncommon. (2 Bl. Com., pages 9, 200, 211; *Cooley's Const. Limit.*, page 360.)
 7. As to presumption of death. (*Greenleaf on Evidence*, volume 2, page 178; *Starkie on Ev.*, volume 2, page 365; *Bailey v. Hammond*, 7 Vesey, 590; *Baxter v. Baxter*, 5 Vesey, 458; *Junius v. Compton*, 1 Rowle, 375; *Dunsmen v. Boulderson*, 5 Jur., 958; *Grissel v. Stilfox*, 9 Jur., 890; *In re Grant*, 6 Vesey, 512; *Lee v. Wilcox*, *Ibid.*, 605; *Banning v. Griffin*, 15 East, 149; *In re Phene*, 5 L. R. Ch.; *Morehead & Brown*, page 544; 1 Revised Statutes, pages 458, 469; General Statutes, section 16, page 412; *Howse v. Stoker*, Revised Statutes, volume 1, page 471 (n); *Foulkes v. Ray*, 7 Bush, 568.)

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8. The act establishes a rule of evidence, which is not objectionable because retrospective. (Cooley's Const. Limit., 367.)
9. Where there is a right, the Legislature may give a remedy. (Cooley's Const. Limit., pages 373-4.)
10. Other States have similar statutes. (Connecticut Statutes, page 345, sections 2, 8; Cal. Stats., sections 41, 5670, 11966; Ark. Stat., sections 2385, 5538; Texas Stat., section 3957; Ill. Stat., volume 2, page 956; Va. Stat., page 877, sections 30-32; Pa. Stat.)
11. Decisions under the statutes of other States. (West's Appeal, 64 Pa., 146; Commonwealth v. Naile, 88 Pa. St., 435; Deadrick v. Co. Court, 1 Cold. (Tenn.), 202.)
12. Statutes are presumed to be constitutional until the contrary is clearly shown. (Cooley's Const. Lim., pages 88, 183; Ogden v. Sanders, 12 Wheat., 270; Cumb. and Ohio R. R. Co. v. Barren Co., 10 Bush, 162.)
13. It is sufficient for the State to show generally that no one has been found to claim as heir. (People v. Fulton Fire Ins. Co., 25 Wend., 216; People v. Etz, 5 Cow., 314; Doe v. Jesson, 6 East, 80; King v. Fowler, 11 Pick., 302.)
14. In a pedigree case a man presumed to have died, is presumed to have died unmarried and without issue. (Doe v. Dakin, 17 Eng. C. L., 300; Oldham v. Wooley, 15 Eng. C. L., 150.)

SAME COUNSEL IN PETITION FOR REHEARING.

1. The Board of Trustees is a department of the State Government, and, therefore, a right to sue it is a right to sue the State. (Board of Trustees v. Auditor, 80 Ky., 341; General Statutes, page 158, section 1, article 2.)
2. The rule of evidence applicable in real actions does not govern in an action to escheat personalty. (McComb v. Wright, 5 Johns. Ch'y, 263; King v. Fowler, 11 Pick., 302; Hays v. Triple, 3 B. M., 106; Sprig v. Moale, 28 Md.; Stinchfield v. Emmerson, 52 Me., 465; Harvey v. Thornton, 14 Ill., 217; Finley v. Humble, 1 A. K. Mar., 294; Commonwealth v. Blanton, 2 B. M., 293; 2 Best on Evidence, 406.) Personal property vests in the administrator, and there is no right of action in the heirs or distributees. (2 Chitty's Bl., 512; Newman's Pleading and Practice, 94-5, and authorities cited.)
3. The act of April 30, 1884, as to escheats, passed pending this appeal, must control the decision of this court. (Acts 1884, volume 1, page 90; Gaines v. Gaines, 9 B. M., 301; Louisville v. McKegney, 7 Bush, 654; Allison v. R. R. Co., 9 Bush, 248; Cooley's Const. Lim., page 367; State v. Norwood, 12 Md., 204; U. S. v. Schooner Peggy, 1 Cranch, 106.)

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JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

By an act approved April 22, 1882, the Legislature provided:

"1st. That article 1, chapter 36, General Statutes, be amended as follows: That all property, rights of property, credits or moneys, held on deposit or otherwise, the last known owner of which has not been heard of for eight years, and has not exercised any act of ownership over the same for eight years, shall vest in the Commonwealth without office found, and may be recovered by the Commonwealth by an action in equity. The receipt of the Auditor, or the order or judgment of a court of equity, shall be a full discharge or acquittance to the person or depository surrendering the possession of said property: *Provided*, That property in the city of Louisville subject to escheat to the Commonwealth, shall vest in the Board of Trustees of the Male High School, the Female High School, and the Public Schools of the city of Louisville, for the use and benefit of the said schools, and the said board shall have and exercise as to all such property the rights, remedies, and responsibilities of the Commonwealth as provided in this chapter as amended.

"2d. * * * The net proceeds of any estate embraced in this chapter which may be paid into the Treasury, shall be reimbursed to the owner or person by law entitled to the same, who had not before asserted claim thereto, upon his producing to the Auditor the certificate of a court of equity, that in a proceeding upon petition in said court, after due notice served upon the Auditor, and time given

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to make defense, it was found, upon final hearing, that the claim was just and proper: *Provided*, That the State shall not be liable for money paid to the Board of Trustees of the Public Schools of the city of Louisville, but the said board shall be liable therefor, in like manner as the State is liable, where it has received the escheated property, and shall refund the same upon like proceedings against it, as provided for in this chapter against the State."

This action was brought on May 18, 1882, by the Board of Trustees of the Public Schools of Louisville, under the act *supra*, to recover of the Bank of Louisville certain deposits made by different persons, at different times between the years 1835 and 1864. Following the provisions of the act, it was alleged that the depositors had not been heard of for more than eight years; that they had not exercised any act of ownership over the money for said length of time, and that the plaintiff was, therefore, entitled to it as an escheat. A demurrer to the petition was sustained upon the ground that the act was unconstitutional; and whether this ruling was correct is now before us upon a cross-assignment of errors by the appellee.

The plaintiff filed an amended petition, alleging that the depositors had died intestate and without heirs, thus bringing the case within section 1, article 1, chapter 36, of the General Statutes, which says: "That part of the estates not disposed of by will of persons who have died, or may hereafter die in this Commonwealth, without heirs or distributees entitled to the same, shall vest in the Commonwealth

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without office found, subject to the debts and liabilities of the decedent."

The answer of the bank put in issue the statements of the petition as amended; and the only evidence taken was by the plaintiff, and it consists of the testimony of the president of the bank, who became connected with it in 1851 or 1852, and the cashier, who had been such officer for ten years; and is of an entirely *negative* character so far as it relates to the death of the depositors, and whether they died intestate and without heirs.

Upon these points they, in substance, say that they know nothing of the depositors; do not know whether they are dead or alive; or whether they ever knew them or not; or whether they could identify them or not; or if dead, whether they died testate or intestate; or if intestate, whether they left heirs or not; but that they have not exercised any control over the deposits within the previous eight years, or indeed at any time since they were made, to their knowledge.

Upon the hearing in chief a judgment was rendered for the Board of Trustees, and the appellant has appealed upon the ground that it is not supported by the testimony.

It is proper to first pass upon the question presented by the appellee, because if the act of April 22, 1882, is constitutional, then the judgment must stand, although the court below based it upon a different ground.

It is urged, upon the part of the Board of Trustees, that the deposits were abandoned property;

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and that the title to them, therefore, vested in the sovereign or State by the common law before the passage, and without the aid of said act; that it merely imposed upon the sovereign as an express trust the taking and holding of such property for the protection of the owner, and the benefit of all, and prescribes only a rule of evidence.

In considering the question, the respect due the law-making power, as well as judicial precedent, requires that we shall *presume* the law to be constitutional; but when the contrary is *clearly* shown, our duty is plain. When a deposit is made in a bank a contract is created between the depositor and it, by which it acquires the right to retain, use and control the money, subject to be returned to its customer upon his demand. That moment a right vests in him to look to the bank, and to *it alone*, for repayment; and, upon the other hand, the bank is invested with the right to hold the deposit against all others. The law then existing becomes an integral part of the contract, and creates these vested rights. The act now in question divests both the bank of its right to hold the money, and the depositor of his right to it, because he has not been heard of for more than eight years, and vests it in the appellee.

This divests both the bank and the depositor of a vested right, because it consists in the power to do certain actions or possess certain things. The obligation of the contract created when the deposit is made is impaired. It consists in the remedy given by law to enforce it; and while the remedy may be

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changed, it can not be taken away or lessened, at least not without, in the language of Mr. Cooley, leaving "*the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.*" (Cooley's Con. Limitations, p. 286.) If it be withheld or taken away the contract has no *legal obligation*.

In this instance the act provides that "the receipt of the Auditor or the order or judgment of a court of equity shall be a full discharge or acquittance to the person or depositary surrendering the possession of said property," thereby depriving the depositor of the right to sue the bank in case of its refusal to pay him, and providing him no "*substantial remedy*" in lieu of it, because, by the act, the depositor has no right to look to the State or sovereign for re-imbursement, but must look to the Board of Trustees of the city schools of Louisville. To hold such a law constitutional would be equivalent to saying that the Legislature may take from A his property and give it to B or a corporation, by providing that the donee shall re-imburse A for it; or that it may transfer the vested contract right of A to look to B for his money or debt to a right to look to another individual. It is urged, however, that the depositor, notwithstanding the provision *supra* of the act, may still sue the bank and recover his money. Even if this be so, it does not render the law constitutional, because, in such an event, it deprives the bank of its vested contract right to hold the money to answer the depositor's demand, and furnishes it no remedy unless it be to

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look to the Board of Trustees for re-imbursement, which would not be a "*substantial remedy*" within the meaning of the law.

If an act forfeiting lands to the Commonwealth in case the owner did not, within a certain time, make certain improvements, was properly held unconstitutional, as impairing the obligation of contracts; or if a replevin law of two years was so as to contracts made before its passage, and when a three months' replevin law was in force, because the remedy was thereby affected, it seems to us there can be but little question but what our duty requires us to say that an act which takes the property of one person and gives it to another or a corporation, however worthy may be its objects, and which makes C, instead of B, the debtor of A, although the latter and B had contracted otherwise; or which takes from B the property intrusted to him by A and gives it to C, and yet leaves B liable to A without affording to B any remedy unless it be the uncertain one of looking to C for re-imbursement, is forbidden by both natural equity and constitutional law. (Sections 12-20, Bill of Rights, General Statutes, pages 121-2.)

The act is not one of limitation, nor does it merely prescribe a rule of evidence. It is not an amendment to chapter 37 of the General Statutes, entitled "Evidence," but its title is: "An act to amend article 1 and article 5, chapter 36, of the General Statutes of Kentucky, entitled 'Escheats and Escheators,' so far as the same shall apply to the city of Louisville;" and it provides, that if the owner of the property

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has not been heard of, and has not exercised any control over it for eight years, that it shall, *ipso facto* and without any judicial determination, vest in the Commonwealth, or if situated in Louisville, then in the appellee.

If, however, the deposits belonged to the State, then it had a right to transfer them to the appellee; and in this respect the law in question is valid, because so much of it as is constitutional and capable of execution must be upheld. The court properly allowed the amended petition to be filed. It did not allege matters constituting a departure from the cause of action attempted to be stated in the petition, but merely supplemental to it; and it was proper to permit an amendment perfecting it, as it was defectively stated.

Coming now to the complaint of the bank, it is claimed that while under our statute and the common law the death of the depositors may be presumed under certain circumstances, yet that it has not been shown that they died intestate and without heirs, and that the law authorizes no such presumption upon the testimony.

Upon the other hand, it is urged that this presumption may arise from merely *negative* evidence, and that the judgment for the Board of Trustees is sustained by *the best evidence the nature of the case affords*.

If the depositors are dead, and died without heirs and intestate, then the State, as the ultimate heir, became entitled to the deposits. After a great lapse of time strict proof in some cases may be dispensed

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with, and its place supplied by presumption. Secondary evidence, however, to be admissible must not only be the best attainable, but the best legal evidence.

By the civil law, death was not presumed from absence; but by the common law, while, in the absence of all evidence, continuance of life to an ordinary age is presumed, and the burden is upon the party alleging the death, yet if an absence from home or the domicile for seven years, without intelligence of the person be shown, then the burden shifts, the presumption of life ceases, and it is incumbent upon the party asserting it to show that the person was alive within that time. Our statute provides:

“If any person who shall have resided in this State go from, and do not return to, this State for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time.”

It only applies to cases where persons leave the State and do not return for seven years; but this was not intended to exclude all presumptive evidence of death, unless the party left the State; and does not apply in this instance, because the testimony does not show where the depositors lived or that they left the State.

We, however, regard the testimony, although of a negative character, as sufficient to raise the presumption of death. The non-appearance of the depositors at the bank for so long a period, and the non-claimer by them of the deposits, are circum-

stances which tend strongly to sustain such a presumption.

The statute, however, only provides for an escheat when the owner dies *intestate* and without *heirs*. The reported cases are somewhat conflicting as to whether not only the presumption of death arises from long continued absence, but also that the person died without *issue*.

In *McComb v. Wright*; 5 John. Chan., 263, it was held that ignorance in a family of one of the children, who had gone abroad at the age of twenty-two *unmarried*, and had not been heard of for upwards of forty years, is sufficient, *with other circumstances*, to warrant the presumption of his death without issue. In *King v. Fowler*, 11 Pick., 302, the same presumption was allowed to prevail, where the person had been absent and unheard of for seventy years, and inquiry had been made where it was most likely that information could be obtained as to him.

In the case of *Hays v. Tribble, &c.*, 3 B. M., 106, it was said that it should not be presumed that a married woman died without issue, because such a presumption was contrary to probability.

In the cases of *Sprigg, &c., v. Moale, &c.*, 28 Md., 497, and *Stinchfield v. Emerson, &c.*, 52 Me., 465, it was held that it will not be presumed that a person died without issue.

We conclude that the correct rule is, that whether such a presumption will be indulged must depend upon the circumstances shown in each particular case. If, for instance, circumstances are proven indicating non-marriage or childlessness, then death

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without issue may be presumed. (2 Greenleaf on Evi., section 354; 2 Wharton on Evi., 1279.) The statute, however, uses the word "*heirs*" and not *issue*; and the legal presumption is, that a person upon his death leaves heirs, either near or remote, capable of succeeding to his estate. It was so held in the case of Harvey v. Thornton, 14 Ill., 217, and where, as in this case, the testimony is merely *negative* and relates to mere absence only, it is insufficient to create the presumption that the person died intestate and without heirs.

It is true that, speaking in the broadest legal sense, comparatively few persons die without heirs, either near or remote, and that the doctrine of escheat proceeds upon the ground that no person appears to claim the estate; but in a case like this, where nothing is shown by the testimony but mere absence, it should not be presumed that the person died without heirs, or that none will appear to claim the property. Other circumstances beside absence should be shown, from which such a presumption may be fairly drawn.

Wherefore, the judgment is affirmed upon the cross-appeal and reversed upon the appeal, and remanded for further proceedings consistent with this opinion.

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CASE 34—PETITION ORDINARY—OCTOBER 1.

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Holsen v. Rockhouse, &c.

APPEAL FROM KENTON CIRCUIT COURT.

CONSTRUCTION OF DEVISE.—A testator devised his entire estate to his widow, providing that “after my death you can divide all I left between our children according to your judgment, and which is the best toward you and keeps the best the Catholic religion.” The widow had one child by a former husband and two children by the testator.

Held—That the widow took only a life estate, with the power to divide the property between her children by the testator as she saw proper; but she had no power to devise any part of the estate to her child by her former husband.

J. F. & C. H. FISK FOR APPELLANT.

1. By the expression “our children” the testator meant the children of his wife by him, and did not mean to include her child by her former husband.
2. The widow, under the devise to her, took only a life estate, with the power to divide the property between the testator's two children in any proportion she might see proper. (Collins, &c., v. Carlisle's Heirs, 7 B. Mon., 14; McGaughey's Adm'r v. Henry, &c., 15 B. Mon., 399; Carroll's Heirs v. Carroll's Heirs, 12 B. Mon., 639; Moore v. Webb, 2 B. Mon., 283; Lasley for &c. v. Blakeman, 4 B. Mon., 539-40; Smith v. Bell, 6 Pet. (U. S.), 74; Thompson v. Vance, 1 Met., 667; Green v. Johnson, 4 Bush, 167; Major, &c., v. Herndon, &c., 78 Ky., 128; Hill on Trustees, 71; Perry on Trusts, sections 112, 250, 251, 254, 256; Roper on Legacies, vol. 2, sections 1418-1425; Griffiths v. Evans, 5 Beav., 241; 1 Story's Eq. Juris., section 169; 2 Story's Eq. Juris., sections 1068, 1068a, 1070 and note, 1071, 1072 and note; 2 Redfield on Law of Wills, 411 (6), 412-416; *Ibid.*, 316, and notes.)

R. D. HANDY FOR APPELLEES.

Brief not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Gerhard Holsen, in the year 1839, intermarried with a widow named Dorothea Rockhouse, her maiden name being Niethfeldt. The widow at the time of her sec-

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ond marriage had one child called Clemens Rockhouse. Holsen had by his wife Dorothea three children; one died in infancy, and the other two, Gerhard and John, survived the father.

One of his sons, Gerhard, left Covington, where they all resided, about the year 1851, and has not been heard from for many years. Holsen, the husband and father, was the owner in fee of the real estate in controversy at the time of his death.

John Holsen claiming to be the only heir, or rather the sole devisee of his father, by reason of the death of his brother, the latter having been gone since 1851, and not heard from, conveyed the property in 1872 to Julia Moog, and she, by a conveyance of the same date, passed the title back to John and his wife Kate, or to the survivor. John died, and Kate Holsen, his wife, claims to own the property.

At the time of Gerhard Holsen's death he left a last will, by which he made the following devise:

"I, Gerhard Holsen, will or bequeath all what I possess in property and monies, houses and lots to my wife Dorothea Niethfeldt, called wife of Holsen. I bequeath this in good health and sound mind, with the condition that if it is possible after my death six holy masses shall be read for the following intentions, &c. * * * * *

"After my death you can divide all I left between our children according to your judgment, and which is the best towards you and keeps the best the Catholic religion."

The widow made no disposition of this property during her life, but at her death left a last will, by

which she divided all of her estate, including the lots in controversy, to her three sons—the son by her first husband and the two sons by Holsen, with the provision that if one died without heirs it should go to the other, or if John should die without children his estate should go to the children of her son Clemens, who was born of her first marriage. John died without children, leaving his wife Kate in possession under the conveyance already recited, and the children of Clemens Rockhouse (the son of the first husband) instituted the present action in ejectment against Kate, the widow of John, for the recovery of the property.

Kate, the widow of John Holsen, claims that her husband, the widow (his mother) having made no disposition of the estate during her life, took under the will of his father, and that the conveyance to Moog and the reconveyance by Moog to herself and husband passed to her the fee, she being the survivor. The right of the widow to dispose of this estate depends upon the nature of her title acquired by the will of her husband.

If she was vested with the absolute fee the action can be maintained by her devisees; if she had a life estate, or had vested in her the power to distribute or divide the estate between the two children, John and Gerhard, by her last husband, Holsen, then she had no power to devise it to strangers, or so limit the estate as to control the manner in which the title should pass in the event their two sons died without children.

The testator, in providing for his children, has

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invested his wife with the discretionary power as to the share each one is to take of his estate. The one most dutiful and obedient she may give more than the other, and in the exercise of this power she is left uncontrolled by the testator.

The testator evidently intended that his children should derive some benefit from his estate, and invested their mother with such a title as would enable her to exercise a discretionary power in dividing the estate between them. She, in fact, had only a life estate, with the power to divide it between the children as she saw proper.

The will is inaptly drawn, and the language used may not express the real meaning and intention of the testator, but we must construe the will and its provisions as we find it; and looking to the condition of the testator with reference to his family, he evidently wanted his children to have his estate, and to give to his wife the right of appropriating it to their use after his death, in such manner and proportion and at such a time as she might deem best for their interest. It was a devise by the testator to his wife of his estate, to be divided between our children at her discretion.

Nor did the testator mean or intend, by the use of the words *our children*, to include the child of his wife by her first marriage. They had two children living, born of the last marriage, and it would be a strained construction to say that the father, when disposing of his estate, regarded the child by Rockhouse as much entitled to his bounty as his own children.

The testator was directing his wife as to the manner she should dispose of the property between the children—*our children*—the children begotten by me, the testator. It was neither natural nor reasonable for the testator to give to the child of Rockhouse an equal portion of his estate with his own children; and in the absence of more direct and definite language than is found in this devise, the testator's bounty must be confined to his own children, the children of himself and Dorothea *Niethfeldt*, the testator, in the devise to the wife, using her maiden name.

In the case of *Collins v. Carlisle's Heirs*, 7 B. M., 14, the testator made this devise: "As to my property and wealth, I first wish all my debts and funeral expenses paid, and the balance of my estate, wholly, I leave to my beloved wife, Nancy Carlisle, and to be disposed of by her and divided among my children at her discretion." The question made in that case was as to the character of estate vested in the wife, and it was held that she held only a life estate.

In analyzing the devise in question, there is but little if any difference between its provisions and that of the will of Carlisle, the object in each will being to vest the wife or the widow with a discretionary power in disposing of the estate between the devisee's children.

In the case of *McGaughey's Adm'r v. Henry*, 15 B. M., 383, the land in controversy was set apart by the testator "for the exclusive benefit of my wife, to be disposed of in any way she may think

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proper as life interest, *and at her death or before* to give said land to any one or more of her said children as she may believe them most worthy or needy." It was argued in that case that a fee-simple was intended with a restricted power of disposition; but the court held that the widow had only a life estate, and that one object in conferring upon her such a power of disposition was to enable her to secure the respectful and affectionate attention of the children.

In the case of *Moore v. Webb*, 2 B. M., 282, the estate was devised to the widow "to dispose of as she might think best whilst she survived him, and that whatever disposition she might make of it at her death should be duly and strictly attended to and stand good in law." This was held to pass the absolute fee, and in it we find a marked difference from the cases cited in which it was held that the widow had a limited or restricted interest. The power to dispose of the estate whilst the widow survived was not only expressly conferred in the last-named case, but the power of disposition at her death without condition was expressly given.

Under the will of the testator, the power to deprive his own children of any part of his estate, or to limit it for life with remainder to those who were strangers in blood, was never vested in his wife, and the undertaking to dispose of the property by her will to the children of Clemens Rockhouse was in violation of the trust reposed in her by the will of her husband and passed no title. The wife having the power to give to the two children the estate in such manner and at such time as in her judgment she thought

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proper, must be held to have had an estate for life only, and at her death being undisposed of, the estate passed to the testator's two sons.

The judgment is reversed, and a new trial awarded for proceedings consistent with this opinion.

CASE 35—PETITION EQUITY—OCTOBER 6.

Mallory v. Dauber's Ex'r.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **EXECUTIONS—LIENS—SUBSTITUTION.**—An execution defendant, at the time the execution was placed in the sheriff's hands, owned real estate, subject to mortgage liens, amounting to \$15,000. Before the execution was levied appellant, a stranger to the execution, purchased the property for \$6,000, paid to the mortgagees. They released their liens for his benefit, but did not assign the mortgage or mortgage notes. The execution was then levied on the property as the absolute property of the defendant.

Held—That appellant is not entitled to be substituted to the liens of the mortgagees, except to the extent of the amount paid by him.

2. **INJUNCTIONS—JURISDICTION.**—Section 285 of the Code, which provides that "an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered," applies not only to the party against whom the judgment was rendered, but to all parties who seek to stay proceedings on the judgment.
3. **THE LOUISVILLE CHANCERY COURT** has no authority to grant an injunction to stay proceedings on a judgment of the Jefferson Court of Common Pleas.
4. **DAMAGES ON DISSOLUTION OF INJUNCTION.**—Although an injunction to stay the sale of land under an execution issued from the Jefferson Court of Common Pleas was improperly granted by the Louisville Chancery Court, yet as the plaintiff in the injunction had an equity against the defendant, and a resort to the Chancellor was necessary, the Chancery Court had the power to give mere nominal damages upon the dissolution of the injunction; but that

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118	715

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court having failed to dissolve the injunction, this court will not reverse on the cross-appeal for that error alone, in order that the lower court may determine the damages the defendant is entitled to.

5. **EXECUTION LEVY—EFFECT OF INJUNCTION BOND.**—An injunction bond to the effect that if the injunction is dissolved the plaintiff will have the property levied on, or its value, forthcoming, to satisfy the order of the court, does not release the execution levy. A bond to satisfy the execution, in the event the injunction is dissolved, is the bond that discharges the levy, and the remedy, in such a case, is on the bond and not by a sale of the property upon which the levy was made.

E. E. MCKAY FOR APPELLANT.

1. The judgment should have perpetuated the injunction, without sale or further order, because the execution was not levied subject to the incumbrances, as it should have been levied. (Act of 1828, 1 Stat. Laws, 653; 1 Rev. Stats., page 327; General Statutes, pages 256, 435; *Forest v. Phillips*, 2 Met., 197; *Campbell v. Woolridge*, 6 Bush, 324; *Atkins v. Emerson*, 10 Bush, 12.)
2. If a sale is made appellant is entitled to the full benefit of the liens released to him, and not merely to the extent of the amount paid by him for them. (*Addison v. Crow*, 5 Dana, 276; *General Statutes*, page 256; *Mosier's Appeal*, 56 Pa. St., 76; *Valle v. Fleming's Heirs*, 29 Mo., 162; *Peltz v. Clarke*, 5 Peters (U. S.), 483.)
3. The Louisville Chancery Court has jurisdiction to enjoin proceedings on a judgment of the Jefferson Court of Common Pleas. (*Bullitt's Code*, sections 17, 768, 777; *Myers' Code*, section 314; *Myers' Supplement*, pages 560, 770; *Rudd v. Woolfolk*, 4 Bush, 559.)
4. The bond executed by appellant did not discharge the levy. (Subsections 1 and 3, section 278, Civil Code.)

R. W. WOOLLEY, JAMES HARRISON FOR APPELLEE.

1. The releases by the mortgagees re-invested the title in the mortgagor, and enlarged the estate subject to the execution lien. (*Dengman v. Randall*, 13 Cal., 512; *Stearns v. Godfrey*, 16 Maine, 162; *Campbell v. Carter*, 14 Ill., 286; *Boyd v. Parker*, 43 Md., 208; *Gannor v. Eldridge*, 1 Greenleaf, 145; *Woollens v. Hellen*, 9 Gill. (Md.), 192; *Somers v. Skrivner*, 8 Pick., 55.)
2. A volunteer purchaser will not be subrogated to the rights of mortgagees whose debts he voluntarily pays. (3 Paige, 117; *Sandf.*, 384; 8 Leigh, 588; 10 Sergt. & R., 399.)
3. The Louisville Chancery Court had no jurisdiction to enjoin proceedings on a judgment of the Jefferson Court of Common Pleas. (Civil Code, section 285.)

Mallory v. Dauber's Ex'r.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

L. S. Hardin, for the purpose of securing several of his creditors, executed to them a mortgage on his real estate in the county of Jefferson, the mortgage debts amounting to near \$15,000.

The appellee, a judgment creditor, had an execution issued on his judgment, and while in full force placed it in the hands of the sheriff of Jefferson county.

The appellant, Mallory, after the execution came to the officer's hands, by some arrangement with the mortgagees and the debtor, purchased the realty for six thousand dollars, the mortgagees releasing their liens for the balance of their mortgage debts. After the release was entered, the judgment creditor levied his execution on the realty, or, perhaps, had levied it before the release (but whether before or after is immaterial), and proceeded to sell the property to satisfy his debt. The judgment was rendered in the Common Pleas court, and the appellant, Mallory, claiming to be the absolute owner, obtained an injunction from the Chancellor staying proceedings on the judgment sought to be enforced until the matters alleged for his injunction could be heard and determined.

The lien in behalf of the execution creditor existed prior to the purchase by the appellant, and, therefore, remained in force until the land was sold, or some act done by the plaintiff in the execution or the sheriff that released it. No such state of case has been made to appear, but, on the contrary, while the execution creditor was attempting to enforce his judgment, the appellant made his purchase, and when the actual

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levy was made had obtained his deed. He was a purchaser in contemplation of law, with notice of the lien by the appellee, and bought subject to it.

When the property was sold or the levy made, all the mortgage had been released except six thousand dollars, the amount of the purchase by the appellant. The release was made in the ordinary way by an entry on the margin of the deed book releasing the lien. The mortgage lien had then been reduced to six thousand dollars, and, therefore, the execution creditor could have sold subject to that lien. It is urged, however, by the appellant, that inasmuch as the lien for fifteen thousand dollars existed when the execution lien was created, therefore the sale should have been made subject to the lien for the entire amount. If the debtor had satisfied the debt except six thousand dollars, or the creditor before the sale had released his lien except as to the six thousand dollars, we know of no rule of law or equity that would require the unsecured creditor to sell subject to a lien that did not exist.

The appellant maintains further that the release was for his benefit, and doubtless such was the case. He was not aware of the execution lien, or, if so, failed to provide against its effect. The appellant did not purchase the notes from the mortgagees. There was no assignment from them to the appellant of the balance of the claim, nor is there any proof showing that he was to have the benefit of the claims in any way. It was an absolute unconditional release of the lien with the notes doubtless surrendered to the original debtor. The mortgagees have not tes-

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tified in the case, and the only witness is the appellant, who says the release was for his benefit. This must have been the case so as to give him a perfect title, but it is not pretended or proved that he became the owner of the balance of the indebtedness, or that he is now the owner. The mortgagees agreed that they would release their lien if he would pay to them six thousand dollars, and this they did.

We see no escape from the judgment below giving to the appellant a prior lien for the amount paid the mortgagees, and then permitting the execution creditor to assert his lien, or, in other words, selling the land first to satisfy the amount paid by appellant on the mortgage debt, and then to satisfy the debt of the execution creditor. The appellant having paid six thousand dollars of the mortgage debt by an agreement between the parties was entitled to be substituted (to that extent) to the rights of the mortgagees. There being no assignment of the notes and no transfer of the mortgage for the benefit of the appellant, the judgment must stand on the original appeal.

The appellant did not release the levy of the execution by his injunction bond, as the condition of the bond was to the effect that if the injunction was dissolved he would have the property or its value forthcoming to satisfy the order of the court. A bond to satisfy the execution in the event the injunction is dissolved discharges the levy, and the remedy is on the bond and not by a sale of the property upon which the levy was made. (Civil Code, section 278.)

On the cross-appeal of the appellee it is argued that the Vice Chancellor had no power to grant an

Mallory v. Dauber's Ex'r.

injunction to stay proceedings upon a judgment rendered by the Common Pleas court. Section 285, Civil Code, provides: "An injunction to stay proceedings on a judgment shall not be granted, in an action brought by the party seeking the injunction, in any other court than that in which the judgment was rendered."

This is a comprehensive provision, and applies not only to the party against whom the judgment was rendered, but to all parties who seek to stay proceedings on the judgment, and if not in this case, the lien of the appellee existed before the appellant became the owner, and while the appellee was endeavoring to enforce his lien and had placed his execution in the hands of the sheriff the appellant interposed as purchaser and claimed the absolute estate.

We have not been cited to any provision of the Code by which the Chancellor or the Vice Chancellor can, by a proceeding in his court, enforce the collection of a judgment rendered in the Common Pleas court, and, therefore, the injunction should have been dissolved. The appellant, however, was properly in a court of equity in order that the liens asserted by himself and the execution creditor might be adjusted. The lien of each was claimed to be prior in date, or, in fact, each claimed to hold the property regardless of the lien the other asserted.

It is evident, however, that the appellant by his purchase became entitled to the lien of the mortgagees to the extent that he had paid the mortgage debt, and the common law judge could not, in a controversy between him and the execution creditor, have

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substituted the appellant to the rights of the mortgagees, and the execution creditor claiming his right to sell the entire property, a resort to the Chancellor was the remedy to be adopted by the appellant. If, therefore, the appellant had an equity as against the appellee, although the injunction was improperly granted, the court had the power to give mere nominal damages on its dissolution; but having failed to dissolve the injunction, this court will not reverse on the cross-appeal for that error alone, in order that the court below may determine the damages the appellee is entitled to recover. The Code provides:

“If the collection, payment or use of money be enjoined, the damages may be any rate per cent. on the sum released by the dissolution which, in the discretion of the court, may be proper, not exceeding ten per cent.” This discretion is not arbitrary, but in determining the equitable rights of the parties, and the necessity of resorting to a court of equity for relief, the fact that the Chancellor had no power to grant the injunction does not require him to lose sight of the equities between the parties, in order that he may award damages on the dissolution of the injunction.

The damages in this case should have been nominal only, and, therefore, the judgment is affirmed on the original and cross-appeal.

CASE 86—MOTION—OCTOBER 6.

Commonwealth v. Hawkins, &c.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. IN CONSTRUING A POWER OF ATTORNEY the intention of the parties and not the letter must control, and if the object can be ascertained from the instrument, it must be so construed as to effectuate that object.

A power of attorney authorizing the signing of the maker's name as surety for a sheriff in a bond for the collection of the State revenue, and also "to indemnify any liability" of said sheriff on a former bond "against any loss or damage, by reason of the suretyship thereon," authorized the execution of a new bond *containing a clause of indemnity to the sureties in the old one.*

2. PRINCIPAL AND AGENT.—If the line can be drawn between the good execution of a power and the excess, and they are not so interwoven as to be inseparable, then the former is binding upon the principal.

The fact that an agent, authorized to sign his principal's name as a surety in a sheriff's bond for the collection of the State revenue, executed a bond containing a covenant of indemnity to the sureties in a former bond did not render the covenant to the State inoperative, even though the covenant of indemnity was unauthorized.

3. APPARENT AUTHORITY OF AGENT.—A principal is responsible for the appearance of the agent's powers, and if the act of the agent is within his apparent authority the principal is bound.

P. W. HARDIN, ATTORNEY-GENERAL, FOR APPELLANT.

1. In construing the power of attorney the intention and not the letter must control. (*Schultz v. Johnson*, 5 B. M., 499; *Meriwether v. Lewis*, 9 B. M., 168.)
2. As the covenant of indemnity to the former sureties and the covenant to the State are separate and distinct, the latter may be enforced even though the former be void because the agent exceeded his authority in including it in the bond. (*Vanada's Heirs v. Hopkins*, 1 J. J. M., 294.)

JOHN W. RODMAN FOR APPELLEES.

1. The power of attorney did not authorize the agent to execute a bond containing a clause of indemnity to the sureties in the old bond.
2. A special agent does not bind his principal unless his authority is strictly pursued, and those dealing with him are chargeable with

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- notice of its extent. (Dunlap's Paley's Agency, 202; 2 Kent's Com., 620; Story on Agency, sections 21, 126; 1 Am. Leading Cases, 560, and note; 8 Wendell, 494; Thompson v. Stewart, 3 Conn., 171; 15 Johns., 44; 18 Johns., 363; Batty v. Corsswell, 2 Johns., 48; DeHart, &c., v. Wilson, &c., 6 Mon., 580; 4 J. J. M., 456; Ross v. Davis, *Ibid.*, 386; Craycroft v. Selvage, &c., 10 Bush, 709; Craighead v. Peterson, 72 N. Y.; Wood v. Goodridge, 6 Cush., 117; Attwood v. Munnings, 7 B. & C., 278; Hubbard v. Elmer, 7 Wend., 446; Hodge v. Combs, 1 Black, 192; Draper v. Rice, 56 Iowa, 114.)
3. The act of the agent is regarded as a whole, and can not be separated. It must be good for all it purports to be, or good for nothing. (DeHart, &c., v. Wilson, &c., 6 Mon., 580; Park v. President and Managers of S. & L. Turnpike Road Company, 4 J. J. M., 456.)
 4. As to what is necessary to bind one as surety. (Billington v. Commonwealth, 79 Ky., 401.)

W. LINDSAY ON SAME SIDE, IN PETITION FOR REHEARING.

1. The intention is to be gathered from the words of the writing. There can be no construction or interpretation of words which mean nothing.
2. It is not a question of mere intention upon the part of the *surety* when he is sought to be bound. (Billington v. Commonwealth, 79 Ky., 400.)
3. The power of attorney ought to be as certain as the bond to be executed pursuant to it. (Trumbow v. Aldrich, 8 N. H., 31.)
4. The bond upon which appellant seeks to recover was taken at the instance, and for the benefit, of the dissatisfied sureties. It is but a single undertaking, and must be wholly good or wholly bad. (General Statutes, chapter 100, section 25; *Ibid.*, chapter 104, sections 1, 2, 3, 4, 5, 6 and 7; Commonwealth v. Adams, 8 Bush, 41; Bartley v. Fraine, 4 Bush, 375; DeHart v. Wilson, 6 Mon., 577.)
5. The county court saw, or should have seen, that the bond offered was not the bond authorized by the power of attorney to be executed. (Bracken County, &c., v. Daum, 80 Ky., 388.)
6. If the signature of Berry's name to the bond upon which appellant seeks to recover was unauthorized, then the bond does not correspond with the paper accepted by the county court, and no recovery can be had upon it against any of the obligors therein. (Fletcher v. Leight, Barrett & Co., 4 Bush, 303.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The sheriff of Franklin county on December 11, 1880, executed his bond for the collection of the State

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revenue for 1881, with John W. Jackson, R. D. Armstrong, and others as his sureties. At the June term, 1881, of the Franklin County Court the two sureties above-named made a motion, upon due notice, requiring the sheriff to give a new bond, and to indemnify them in their said suretyship. An order was entered requiring the sheriff "to execute a new bond, conditioned for the collection of the State revenue of said county for the year 1881, and for indemnity to said R. D. Armstrong and John W. Jackson for any loss, cost or damage legally incurred by them by reason of their suretyship in the bond executed by said E. O. Hawkins, as sheriff aforesaid."

The order further recites, that "said E. O. Hawkins, together with Hiram Berry (and others, naming them), his sureties, entered into and acknowledged a covenant to the Commonwealth of Kentucky, conditioned for the collection by said Hawkins, as sheriff of Franklin county, of the State revenue of said county for the year 1881, and for indemnity to R. D. Armstrong and J. W. Jackson for any loss, cost or damage legally incurred by them by reason of their suretyship in the bond executed by said Hawkins as sheriff of said county with them and others as sureties, dated December 11, 1880."

The bond approved by the order stipulates, "that the said E. O. Hawkins, as sheriff, shall well and truly collect, account for, and pay over to persons entitled to receive the same according to law, the revenue and public dues of the county of Franklin for the year 1881, and that he shall, when called upon by the Auditor, settle his accounts and pay over the amount, if

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any, of public money in his hands belonging to the Commonwealth; and that the said E. O. Hawkins shall in all things well and truly demean himself and perform the duties of collector of the State revenue of said county; and we further covenant to indemnify J. W. Jackson and R. D. Armstrong against any loss or damage legally incurred by them by reason of their suretyship in the bond executed by E. O. Hawkins as sheriff of Franklin county, with them and others as sureties, dated December 11, 1880."

It was signed as to the appellee Berry, "Hiram Berry by Ira Julian, attorney in fact," by virtue of a power of attorney, which reads thus:

"I, Hiram Berry, of Franklin county, Kentucky, do hereby authorize and empower Ira Julian to sign and deliver for me and in my name as surety for E. O. Hawkins on three bonds—

"1st. A bond for the collection and payment of the State revenue of Franklin county for the year 1881, and also to *indemnify any liability* of said Hawkins on his bond executed the 11th December, 1880, against any loss or damage by reason of the suretyship thereon.

"2d. A bond for the faithful discharge of the duties of said Hawkins, as sheriff on the aforesaid bond, and also to indemnify any of his sureties on his official bond executed December 11, 1880, against any loss or damage by reason of their suretyship thereon.

"3d. A bond for the collection of the county levy for Franklin county, and payment of all sums collected by said Hawkins as sheriff, to the proper au-

thorities, and to indemnify any surety on his previous bond, executed the 11th December, 1880, against any loss or damage by reason of the said suretyship.

“This June 1, 1881.

“HIRAM BERRY.”

To this motion by the State, upon the bond executed June 6, 1881, for a deficit of \$5,051.87 of the State revenue, the appellee Berry presented a plea of *non est factum*, based upon the ground that the power of attorney from him did not authorize the execution of the bond, or, in other words, that the bond contained a covenant of indemnity to the sureties, Jackson and Armstrong, which was not authorized by the power of attorney; and that, therefore, he was in no way liable upon the bond.

The sole question is the sufficiency of the power of attorney. The learned special judge who tried the cause below held, upon demurrer, that the answer was sufficient, and dismissed the motion as to Berry; and our regard for his opinion has caused us to hesitate as to the conclusion which we have reached. But to our minds it is the only one consistent with both reason and law, and it must, therefore, be adopted.

The language in the first clause of the power of attorney, and which relates to the execution of the State revenue bond, is: “And also to indemnify *any liability* of said Hawkins on his bond.”

This, if interpreted literally, means nothing. Neither Hawkins, owing to his being the principal, nor “any liability” could be indemnified.

The *intention* of the parties and not the *letter*

must control in the construction of the instrument. The purpose and design of it must be considered, and it must be supposed that the parties intended to make it effectual for some purpose. If the object can be ascertained from the instrument, then it must not be so construed as to make it ineffectual, because that would frustate the intention of the maker. It was well said in the case of *Vanada's Heirs v. Hopkins' Adm'r, &c.*, 1 J. J. Marshall, 287 :

“But all powers conferred must be construed with a view to the design and object of them, and the means most usual and proper for carrying their design and object into effect, having respect to the language which the maker of the power employs to convey his meaning and intent.”

It is true that the language of a power of attorney can not be enlarged by construction so as to make it mean what the maker did not intend ; but when the power in question is read in the light of the above rule, and all three of its clauses are considered, we think there is no doubt but what the maker intended by it to authorize the execution of not only a new bond, but one containing a clause of indemnity to any of the sureties in the old one. It at least has this appearance, and a principal is responsible for *the appearance* of the agent's powers. If he has clothed him with apparent power, he is, and it is right that he should be, bound by his act. It was not necessary, perhaps, to decide this question, because another, to our mind, is decisive of the case, even if we were in error in the above conclusion.

The first section of chapter 104, General Statutes, provides, that a motion may be made by a surety upon an officer's bond for a new bond, and to obtain indemnity as to the existing one or *either*; and the sixth section of the same chapter provides:

"If a new bond is given, it shall operate as a discharge of all the sureties making the motion from all liability for the acts of the principal thereafter done; and if the object be so specified, the bond shall contain a stipulation or covenant to indemnify the said sureties against any loss, cost or damage legally incurred by reason of said suretyship."

The question in this case is between the State and the appellee Berry; and not between him and the sureties upon the former bond. It is a motion upon the new bond for the unpaid revenue; and the power of attorney in express words authorized the execution of a new bond; and even if it had not authorized (as we think it did) the covenant of indemnity to the sureties in the old bond, yet should the covenant of the new bond to the State therefore be inoperative?

We think not. It is true that Julian was a special agent for a particular purpose; and it is well settled that one dealing with such an agent is required to know his power; and if it is exceeded, or the act varies substantially from his authority, then his action is *ultra vires* and not binding upon his principal.

The cases which lay down this doctrine in general terms are quite numerous; but we apprehend that it is not meant by this, that if the agent is authorized by the same instrument to do two separate things, affecting different persons, and in the one case he

exceeds his authority, but does not in the other, that therefore his action is void *in toto* as to his principal, even if his action as to both is evidenced by the same instrument.

The reason a principal is not bound by the act of a *particular* agent, where he has exceeded his power, is that he should not be held liable without *his consent*. If A authorizes B to buy a piece of land at fifty dollars per acre, and he gives sixty for it; or if he authorizes him to buy a particular tract of land and he purchases another, or if he has authorized him to give a note payable in a year, and he makes it payable in sixty days; then in these cases A would not be liable; but if he authorizes him to buy one hundred acres of land of C, and a like quantity of D, a purchase of the latter of a greater quantity would surely not release A from a purchase of C of the quantity which A had authorized.

Lord Coke said: "Where a man doeth that which he is authorized to do and more, there it is good for that which is warranted, and void for the rest." (Co. Lit., 258a.)

Story says: "Where there is a complete execution of the authority, and something *ex abundanti* is added which is improper, there the execution is good, and the excess only void." (Story on Agency, 201.)

As early as the case of *Alexander v. Alexander*, 2 Vesey, 640, decided in 1755, it was held that where a power was exceeded, but the excess was clearly distinguishable from that which fell within it, the execution of the latter was binding on the principal.

The same doctrine is to be found in the cases of

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Hammond v. Michigan State Bank, Walker's Ch. Rep., 214; Drumright v. Philpot, 16 Ga., 424, and Vanada's Heirs v. Hopkins' Adm'r, &c., *supra*. In the case now presented there are two separate covenants in the bond—one to the State and one to the old sureties—and there is no trouble in separating what the attorney had the unquestioned right to do under the power from what as is claimed he had no right to do.

We conclude that the correct rule is, that if the line can be drawn between the good execution of the power and the excess, and they are not so interwoven as to be inseparable, then the former is binding upon the principal.

Even if the attorney in this instance had no power to execute the bond as to the covenant of indemnity, yet the line between it and the covenant to the State is so marked and so easily drawn that the appellee Berry is responsible upon the latter.

Judgment reversed, with directions to sustain the demurrer to the answer, and for further proceedings consistent with this opinion

CASE 87—INDICTMENT—OCTOBER 10.

Allison v. Commonwealth.

APPEAL FROM FAYETTE CIRCUIT COURT.

RECEIVING STOLEN PROPERTY, knowing it to be stolen, is a complete offense distinct from the larceny of the same property, and the circuit court of the county in which the property was received,

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and not of the county in which the larceny was committed, has jurisdiction of the offense of receiving the property, knowing it to be stolen.

P. W. HARDIN, ATTORNEY-GENERAL, FOR APPELLANT.

1. The instruction of the court required the jury to believe that the offense was committed in Jessamine county, and this applies to the receiving of the stolen property, knowing it to be stolen, as well as to the stealing.
2. Where property is stolen in one county and received in another county by a person knowing it to be stolen, either county has jurisdiction of the offense of receiving the stolen property, knowing it to be stolen. (Criminal Code, section 21.) The case of Tully v. Commonwealth, 18 Bush, 152, does not conflict with this view.

WATTS PARKER FOR APPELLEE.

Receiving stolen property, knowing it to be stolen, constitutes a separate and distinct offense from the stealing of the property; and where the property is stolen in one county and received in another, the circuit court of the county in which the property was stolen has no jurisdiction of the offense of receiving the stolen property, knowing it to be stolen. (Tully v. Commonwealth, 18 Bush, 142.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The indictment in this case, found in the Jessamine Circuit Court, but tried in the Fayette Circuit Court, contains two counts. In the first, the defendant is charged with the crime of horse-stealing, and in the second with receiving stolen property, knowing it to be stolen. And the main question presented on his appeal from the judgment of conviction is as to the correctness of the following instruction:

“If the jury believe from the testimony, to the exclusion of a reasonable doubt, that the defendant in the county of Jessamine, before the finding of the indictment herein, either alone or in company with another or others, whom he being present did aid or abet, feloniously took and carried away the horse

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mentioned in the indictment, the property of Rowland Williams, or feloniously received said horse, knowing at the time he received it that it had been stolen, the jury should find the defendant guilty and fix his punishment at confinement in the penitentiary for not less than two nor more than ten years."

The evidence in this case is clear that the horse mentioned was, some time during Sunday night before the October county court of Clark county, 1883, stolen from the owner in Jessamine county, and was on the next day in the possession of the defendant in Winchester, Clark county, when and where he sold it. There is also evidence showing that the defendant was in Jessamine county some time during the Sunday the horse was stolen, but it is also clearly established that he was not there, but in Winchester, during that Sunday night, and did not, in person, actually take and carry away the animal from the owner.

It is conclusive that the offense of which the defendant was by the jury convicted, though not stated in the verdict, was receiving the stolen horse, knowing it to be stolen, as charged in the second count of the indictment, and not the larceny charged in the first count. For they were not authorized by the evidence to find him guilty of alone taking and carrying away the horse; nor could they have found him guilty of aiding and abetting another in the larceny without disregarding the instruction, which, as worded, required them, as a condition, to believe him present when the horse was stolen.

The instruction is not as clear and plain in language as it should be; but we are satisfied the jury

construed it as authorizing them to find the defendant guilty of the offense charged in the second count, though committed in the county of Clark, as there was no evidence it was committed elsewhere. Besides, the bill of exceptions shows that the defendant objected to the instruction on that ground, but the lower court refused to modify it, assuming that the Jessamine circuit court had jurisdiction.

The question of jurisdiction being thus presented, it is our duty to decide it.

Section 18, Criminal Code, provides that "the local jurisdiction of circuit courts * * * shall be of offenses committed within the respective counties in which they are held."

Section 21 is as follows: "If an offense be committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the jurisdiction is in either county."

In our opinion the sole inquiry necessary is, whether receiving stolen property, knowing it to be stolen, is a substantive offense distinct from larceny of the same property. For if it is, then only the circuit court held in the county where it may be committed can take jurisdiction.

It would seem the General Statutes furnish a satisfactory answer to this inquiry. For, while the same punishment is prescribed for the two offenses, they are therein recognized and treated as separate and independent.

Receiving stolen property, knowing it to be stolen,

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is itself a complete offense. It is not necessary, in order to convict of that offense, that the guilt of the person who stole the property shall be first established, nor his name be known or even stated in the indictment, or to prove the accused to be in any way connected with the larceny. The gist of the offense consists of the guilty knowledge of the property having been stolen.

In this case the person who stole the horse in Jessamine county is not known. But the offense charged in the second count was, according to the evidence, committed by the defendant, if at all, wholly in Clark county, and nothing necessary to constitute the offense nor a part of it was done in Jessamine county.

In the case of *Tully v. Commonwealth*, 13 Bush, 142, the defendant was indicted in the Scott Circuit Court, charged with the offense of being accessory, after the fact, to the commission of the crime of murder in that county. But the particular circumstances of the offense, which consisted in furnishing the person charged with murder with money while in the course of his flight with which to effect his escape, and secreting him for that purpose from arrest, occurred in Logan county. In that case this court held, that as the accessorial acts were all done in Logan county, the Scott Circuit Court had no jurisdiction. And if this rule for determining criminal jurisdiction of circuit courts can be applied in that case, we see no reason why it should not govern in this.

It is well settled that a thief can be indicted for a complete larceny, either in the county where he first

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took the property, or in any other into which, the intent to steal continuing, he carries it.

This doctrine rests upon the theory that the title and legal possession continues in the owner, and the asporting it from the county where first stolen is a continuation and renewal of the offense. And section 18 of the Code just quoted was doubtless intended to provide for such case. But in this case the inception and completion of the offense charged in the second count of the indictment were entirely in Clark county, and in our opinion the defendant could be indicted therefor only in that county.

Consequently, the court erred in instructing the jury otherwise, and the judgment must be reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

CASE 88—CONTESTED WILL—OCTOBER 10.

Fee, &c., v. Taylor.

APPEAL FROM KENTON CIRCUIT COURT.

1. WILLS—BURDEN OF PROOF.—When the due execution of a paper, rational in its provisions, and consistent in its details, language and structure, has been proved, the propounder has made out a *prima facie* case, and the burden of showing that the testator was not of sound and disposing mind when the writing was executed shifts to the contestant.
2. PROOF OF HANDWRITING.—The general rule is, that a witness who is introduced to prove the handwriting of a person must have personal knowledge of it, either by having seen him write, or by having seen writing admitted by him to be his, or with his knowledge acted upon as his or so adopted into the ordinary business of life

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as to create a reasonable presumption of its genuineness. The opinion of experts as to the genuineness of the writing in dispute, formed by a comparison with other writings proved or admitted to be genuine, is not admissible unless the writing is so old that living witnesses can not be had, and yet is not old enough to prove itself.

3. EVIDENCE.—Several letters having been offered in the county court as forming together the will of the writer, although the propounder put but one of them in issue upon appeal to the circuit court, it was competent for the contestants to show that the propounder had so offered the others, testifying that they were wholly in the handwriting of the decedent, and then to show that the decedent had not written the testamentary parts thereof.
4. ONE PART OF A CORRESPONDENCE BEING IN EVIDENCE, the other part should have been admitted, the correspondence being of such a connected character that the whole was necessary to properly enlighten the jury.

T. F. HALLAM FOR APPELLANTS.

1. The motion by defendants for a peremptory instruction should have been sustained, because the propounder failed to adduce any testimony that the deceased was of sound and disposing mind and memory at the time when, if at all, he wrote the alleged will. (Hawkins v. Grimes, 18 B. M., 269.)
2. The facts stated in defendants' petition for a change of venue being conceded, their motion should have been sustained.
3. All of the letters offered for probate in the county court, as forming together one will, were admissible in testimony in the circuit court. The propounder having chosen to litigate whether the whole of them was one will, could not, on appeal, suppress such part as was damaging. (Barbage v. Squires, 8 Met., 79; Powers v. Sutherland, 1 Duv., 153; Haynes v. Haynes, 33 Ohio St., 617; Creswell, &c., v. Jackson, &c., 4 Foster & Finlayson, 1; Tibbatts v. Berry, 10 B. M., 476.)

CLEARY, HAMILTON AND CLEARY FOR APPELLEE.

Brief withdrawn.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellee, Hattie Taylor, on February 27, 1882, made a motion in the Kenton County Court to probate four letters from John B. Fee to her, dated respectively January 4, 1880, July 8, 1880, January 2, 1881, and June 30, 1881, as his last will. The appel-

lees, his two sisters, objected, claiming that so much of the first and two last above-named letters as was of a testamentary character had been forged; and that the other letter, dated July 8, 1880, was a forgery *in toto*.

Upon hearing, the county court probated the last named one and that of January 4, 1880; and from this judgment the appellants appealed to the circuit court, and then applied for a change of venue, which was properly refused. The appellee then filed a statement to the effect that she offered for probate only the letter of July 8, 1880, and would not offer that dated January 4, 1880; but was willing the court should reject the latter or direct the jury to find that it was not the last will of the decedent. The parties then went to trial, resulting in a finding that the letter of July 8, 1880, was such last will; and we are now asked to review the case upon an assignment of only one hundred and three errors. We shall only notice such as are deemed material. It is urged that the peremptory instruction to find for the appellants should have been given, because no testimony whatever was offered to show soundness of mind of the writer when the letter of July 8, 1880, was written. When, however, the due execution of a paper, rational in its provisions, and consistent in its details, language and structure, has been proven, the proponent has made out a *prima facie* case; and the burden of showing that the testator was not of a sound and disposing mind when the writing was executed shifts to the contestant. The third instruction given by the court conformed to this rule. The ap-

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pellants offered to show, by experts, by what is commonly known as a comparison of hands, and who did not know the handwriting of the deceased, that the paper in contest was not genuine.

The letter written by the deceased on July 3, 1880, and which was proven and admitted to be genuine, had been properly allowed to go to the jury as evidence, as it was referred to in the one of July 8th; and they proposed to so show, not only by a comparison between it and the disputed one, but between the latter and the other three letters that had been offered for probate in the county court.

Witnesses were at hand and had already testified, who knew the handwriting of the deceased. Any necessity, therefore, for such a course, even if it were allowable, did not exist.

The general rule is, that a witness who is introduced to prove the handwriting of a person, must have personal knowledge of it, either by having seen him write, or by having seen writing admitted by him to be his or, with his knowledge, acted upon as his, or so adopted into the ordinary business of life as to create a reasonable presumption of its genuineness. The exceptions to this rule as given by Mr. Greenleaf, in the first volume of his work upon evidence, section 577, are, first, where the paper is not old enough to prove itself, and yet is so old that living witnesses can not be had; then other writings, proven to be genuine, or to have been treated and acted upon as such by all parties, may be offered, and experts may, by comparison, give their opinion as to the genuineness of the writing in question; or second, where

other writings admitted to be genuine are already in the case; and then the jury may make the comparison with or without the expert aid.

The civil and ecclesiastical law permitted the testimony of experts as to handwriting by comparison. The rule in this country varies in the different States. In some of them the comparison is allowable between the writing in question and any other writing shown to be genuine, whether it be already in the case or not, or relevant or not; while in others it is only permitted as between the disputed paper and one already in the case and relevant to it. Under the rule as adopted in this State, however, the last exception *supra*, and which allows comparison by the jury with or without the aid of experts, is not recognized, the reason doubtless being that no necessity exists for it when witnesses are at hand who know the handwriting. (Hawkins v. Grimes, 13 B. M., 257.)

In view of the necessarily uncertain character of such expert testimony, and the fact that as the media of evidence are multiplied the chances of mistake are increased, we regard this as the correct rule; but we must not be understood as holding that an expert may not testify as to differences in the letters or words, or speak of other facts as they appear to him upon the face of a writing.

The court below, however, refused to permit the appellants to offer in evidence the other three letters which had been offered in the county court by the appellee as being, together with the letter of July 8, 1880, the will of the decedent, or to show that she had so offered them, and had herself testified that they

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were wholly in the handwriting of the decedent; and to then show (as they claimed they could) that he had not written the testamentary parts thereof.

It is true that these papers were not then in issue. Even one of the two that had been probated in the county court was not, because the appellee had, as she had a right to do, elected not to rely upon it. But by so doing she could not deprive the appellants of the right to use them as testimony if they were competent and they so desired. Evidence, to be admissible, must be pertinent to the issue. If it relates to the transaction under consideration, or is connected with it and is not too remote, it is competent. Mr. Wharton says that "it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable." (1 Wharton on Evidence, section 21.)

This is unlike the case of a suit upon several notes where the defense is forgery, and the plaintiff dismisses as to three of them. In this instance, all four of the letters were offered by the appellee in the county court as the will of the decedent, with her avowal and testimony by her that they were genuine. This was her act or conduct, and there was, in our opinion, such a connection between them and the transaction or question at issue in the circuit court as rendered the testimony competent.

For illustration merely, suppose that A offers a letter as the will of B, and it is contested by C as a forgery, would not the latter have the right to offer in evidence letters to the same purport that might be found in A's possession, which were efforts

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at imitation; and this, too, although A had not offered any of them as the will or as a part of it.

We do not mean to intimate what might have been the effect of the testimony in question, or whether, in our opinion, it would have been true or false, or whether it would or would not have produced a different result. The issue was of such a character that it would be improper for us to attempt to measure its effect. It follows that the testimony of the witness Van Loo, and the photographic copies of the letters, were competent evidence for the appellants, provided the court was first satisfied of their accuracy.

As the case, for the errors above indicated, must go back for another trial, it is proper for us to say that, in our opinion, the letters offered by the appellee, which were shown to have been written by her to the decedent, and to have been in his possession at his death, were competent evidence. They were a part of one correspondence of which the other part was already in evidence, and were of such a connected character that the whole correspondence was necessary to properly enlighten the jury.

Judgment reversed, and cause remanded for further proceedings in conformity to this opinion.

Owens Brothers v. Lockwood.

CASE 39—PETITION ORDINARY—OCTOBER 1.

Owens Brothers v. Lockwood.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

PLEADING—FERRY PRIVILEGE.—In this action by appellants to recover damages for an alleged disturbance of their ferry privilege, which they claim by virtue of a lease from the city of Paducah, the petition is fatally defective in that it does not allege that the city of Paducah ever acquired or had the exclusive ferry privilege claimed by plaintiffs. The statement that their ferry is an established ferry, and that they are now the owners of the ferry privilege and the right to collect tolls, &c., is but a conclusion of law.

SAM HOUSTON FOR APPELLANTS.

1. The ferry franchise claimed by appellants was granted to the city of Paducah, with power to lease it. (Session Acts 1836-7, page 148; Session Acts 1846-7, page 100; Session Acts, vol. 2, page 286; Session Acts 1871, vol. 1, page 155; Session Acts 1883-4, vol. 2, page 1080.)
2. The owner of a ferry has a cause of action against every intruder who carries in the line of the ferry, whether it be done directly or indirectly; and it is enough for the plaintiff to prove that he was in possession of a ferry at the time the cause of action arose to entitle him to maintain his action for the disturbance of it. (Trotter v. Harris, 2 Y. & J., 285; Peter v. Kendal, 6 B. & C., 703; Owens v. Roberts, 6 Bush, 608; 3 Kent's Com., side pages 458 and 459; Chitty's Blackstone, Book 3, side page 286; 1 Nott & McCord (S. C.), 387; Ferry Co. v. Barker, 2 Exch., 136; Newport v. Taylor, 16 B. Mon., 779; 7 Cal., 126; Blacketer v. Gillett, 9 C. B., 26; S. C., 1 L. M. & P., 88; 14 Jur., 814; Addison on Torts, 12; Day v. Stetson, 8th Maine; Taylor v. Wilmington, &c., R. R. Co., 4 Jones (N. C.), 277; Long v. Beard, 3 Murphy (N. C.), 57; 2 Iowa, 264.)

JOSIAH HARRIS FOR APPELLEE.

Brief not in record.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellants to recover for an alleged disturbance of their ferry privilege by appellee. And the only question before this court

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arises on the general demurrer to the petition and amended petition, which was sustained.

It is stated in the petition that appellants, as partners, are the owners of the ferry privilege and the right to transport passengers and things across the Ohio river, from Paducah, Kentucky, to the Illinois shore, and to collect tolls therefor, as stated in the lease of the city of Paducah of said ferry privilege to V. Owen in his life-time, to the exclusion of every other person, which lease was made in 1870 for the term of twenty years; that said Owens, in compliance with the terms of the lease, fitted up and furnished a substantial ferry-boat, and also procured the ferry privilege from the Illinois shore, and operated the ferry up to his death, after which event appellants, by purchase, acquired his ferry privilege, and have since operated the ferry.

They state further, that appellee has occupied a landing just above their ferry landing at the wharf in Paducah, and kept a great number of skiffs, which he has hired and continues to hire to persons desiring to cross the Ohio river, at the price of twenty-five cents for each skiff, and that one skiff will carry from five to ten persons, which makes the price of transportation greatly less than appellants can carry passengers at their rates; by which acts of appellee they say their ferry privilege has been unlawfully disturbed, and they have been damaged.

A fatal objection to the petition is, that it does not contain an allegation that the city of Paducah ever acquired or had the exclusive ferry privilege

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now claimed by appellants. For, though it is not in terms stated that the city of Paducah did in fact lease the privilege to V. Owens, we are not authorized by the language of the petition to infer that he had or claimed any other right or interest than as mere lessee. And, of course, the interest appellants acquired by their purchase can be no other or greater than that of sub-lessees. To recover in this action, it is therefore indispensable for them to allege and show that the city of Paducah is the owner of the franchise.

Moreover, the lease referred to is not made part of the petition, nor can it be assumed, from any statement contained in it, that appellants in virtue of their purchase alone, and without the consent of the lessor, succeeded to all the rights of the original lessee.

The only statement in the amended petition not in the original, is that appellants' ferry is an established ferry. But it is not alleged how or by what authority it has been established. And even if the allegation amounted to more than a mere conclusion of law, it would not be equivalent to the necessary statement that the city of Paducah is invested with title to the franchise, or had the right to lease it to V. Owens.

Judgment affirmed.

Smith, &c., v. Western Union Telegraph Co.

CASE 40—MOTION—OCTOBER 10.

Smith, &c., v. Western Union Telegraph Co.

APPEAL FROM LOUISVILLE CHANCERY COURT.

INJUNCTION—EFFECT OF SUPERSEDEAS.—Where, on final hearing, an injunction has been dissolved, the execution of a supersedeas bond by the plaintiff and the service of an order of supersedeas leaves the injunction in full force, and the defendant is guilty of contempt if he disregards it.

EMMET FIELD FOR APPELLANT.

If a final judgment dissolves an injunction and dismisses the action, the injunction is continued in force by appeal and supersedeas. (Talbot v. Morton, &c., 5 Litt., 326; Yocum v. Moore, 4 Bibb, 221; Steele v. Wilson, 9 Bush, 699; Civil Code, sections 747, 752; Whitehead v. Booram, 8 Bush, 400; Johnson v. Williams, 5 Ky. Law Rep., 738; Hutchcraft's Ex'r v. Gentry, &c., 2 J. J. Mar., 500; Runyan v. Bennett, 4 Dana, 598; Turner v. Scott, 5 Ran., 332; Penrice v. Wallace, 37 Miss., 172; Brelsler v. McCune, 56 Ill., 477; Williams v. Pound, 48 Texas, 145; Drake on Attachments, 428.)

ROZEL WEISSINGER FOR APPELLEE.

Where a final judgment dissolves an injunction, an appeal by the plaintiff with supersedeas does not continue the injunction in force. Under the Code an appeal with supersedeas simply stays the execution of the judgment, and does not *suspend* the judgment itself. The old cases of Yocum v. Moore, 4 Bibb, 221, and Talbot v. Morton, &c., 5 Litt., 326, do not now apply. (Sixth Avenue R. Co. v. Gilbert, 71 N. Y., 480; High on Injunctions, section 1709.)

STATEMENT OF FACTS.

The appellee, the Western Union Telegraph Company, furnishes the market quotations direct to its patrons in the city of Louisville, by means of wires running into the offices of its customers, and by means of an instrument owned by it called a "ticker." Appellee threatening to remove the "ticker" from the office of appellant, to whom it had been furnishing the quotations in the manner described, appellant obtained an injunction restraining appellee from refusing to furnish him the market quotations it had theretofore furnished him in any manner less speedy and certain than it furnished the same to other customers, from discon-

83	269
91	638
83	269
94	481
83	269
95	473

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124	436

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126	747

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necting appellant's wire, and from removing the "ticker." The injunction being dissolved on final hearing, appellant executed a supersedeas bond and had an order of supersedeas served. Other facts are stated in the opinion.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant filed his petition and obtained an injunction against the appellee, that on the final hearing was dissolved and the action dismissed.

An appeal was prosecuted to this court with a supersedeas bond executed, and the order of supersedeas served.

It is insisted by counsel for the appellant that the execution of the supersedeas bond left the injunction in full force, and alleging that the appellee had been guilty of violating that order, a rule was awarded by this court against the appellee to show cause why it should not be punished for contempt. The question involved is one of law only, and the merits of the controversy have not been considered. What effect the service of the order of supersedeas had on the proceedings below is the only question involved here.

This court, as far back as the year 1815, in the case of *Yocum v. Moore*, 4 Bibb, 221, decided this question.

The plaintiffs in that case exhibited their bill with an injunction, and on the final hearing the bill was dismissed and the injunction dissolved. The title and right of possession to certain land was involved in the litigation, and the effect of dissolving the injunction entitled the parties to their writs of possession. The clerk refused to grant the writs, an

appeal having been taken, and the lower court, on motion of the plaintiffs, directed the writs to issue. This court, in determining the question, said that the appeal suspended the operation of the order dissolving the injunction as well as that dismissing the bill. "The appeal under the circumstances, while it suspends the decree as to the main subject, should also, we apprehend, suspend the operation of all orders made during the same time incidental and relating to the principal matter in contest." The question as to the effect upon final judgments of the execution of a supersedeas bond and the service of the writ has been the subject of much diversity of opinion in the courts of this country.

The practice in the various States differ widely in this respect, but we may safely assume that the practice in this State has always followed the rule established in *Yocum v. Moore*, and we find nothing in the Code of Practice or in the experience of the past to justify departing from a practice so essential to the rights of parties involved in litigation.

A supersedeas is defined in the Code of Practice to be "a written order signed by the clerk, commanding the appellee and all others to stay proceedings on the judgment or order." It is a remedy provided by law for the unsuccessful litigant who complains of certain errors committed to his prejudice by the court below, and stops all proceedings on the judgment until this court disposes of the appeal.

If an injunction is the primary object of the action, or is an incidental remedy in aid of the pur-

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poses of the original action, the supersedeas, when the case has been finally disposed of and the injunction dissolved, will have the effect to suspend all proceedings until the appeal is determined.

Like a motion for a new trial upon grounds filed, it suspends the judgment so that neither party can act upon it until that question is disposed of. An officer with an execution in his hands for the collection of the amount of the judgment may be enjoined by the debtor when the debt has been satisfied since the judgment was rendered, and the dissolution of the injunction with the final judgment may be stayed by a supersedeas until the rights of the parties are heard on the appeal. It is not, as said in some opinions conflicting with these views, a reversal of the judgment by the mere act of the party against whom it was rendered, but is a remedy afforded all unsuccessful litigants by which the judgment is suspended until revised by some other tribunal.

If one is about to tear down my home, or waste and destroy my property, so as to produce irreparable injury, an injunction having been obtained, although subsequently dissolved, will remain in full force if the proceedings are stayed by a supersedeas.

On the other hand, it is argued that if the injunction to stay waste or to prevent irreparable injury is made perpetual, and the relief granted by the court below, the party who has been enjoined from committing the wrong may appeal from the judgment, and by a supersedeas proceed to do that which, by the judgment, he has been enjoined from

doing. This does not follow. A party against whom a judgment has been rendered acquires no right to disregard that judgment by the execution of a supersedeas bond. He may prevent its execution by suspending its operation, but nothing more. All the supersedeas can do is to stay the proceedings under it, so as to prevent his adversary from acquiring any rights by virtue of it until the case is finally disposed of.

As an illustration of the principle involved: In an action for the recovery of specific personal property a judgment is rendered against the plaintiff. He appeals and executes a supersedeas bond and has his supersedeas issued. This will not authorize him to take the property from the defendant, or to control it as if the judgment had been in his favor, nor in a case where the execution has been enjoined can the creditor, if the injunction is made perpetual, execute his supersedeas bond and proceed to collect his debt. The supersedeas confers no new right, but simply suspends the judgment, with all the preliminary orders.

Where the injunction is made perpetual the party enjoined is guilty of contempt if he violates the injunction, although he has executed a supersedeas bond. The supersedeas is only allowed him for the purpose of preventing the successful party from enforcing his right under the judgment, and if that right is merely negative or prohibitory in its character, a supersedeas is unnecessary, except to prevent the issuing of an execution for costs. A party in enjoining an execution may give a bond to pay the

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judgment in the event the injunction is dissolved, and this releases the levy.

This, however, is an express provision of the Code, and we are aware of no case where the execution of a supersedeas has been held to discharge the injunction or to arrest the judgment. It is only a stay of the proceedings, and gives to the appellant no right to disregard a mandatory order. If so, the right must be given by the supersedeas, and to sanction such a practice would enable the unsuccessful party to annul the judgment by his own act, and to do that which the judgment says he shall not do. The right to suspend the judgment belongs to every appellant; but if there is a lien on property the supersedeas does not release it; or in the case of an injunction mandatory or prohibitory in its character he can not disregard it, the sole effect of the writ being to prevent the successful party from executing the judgment. It results, therefore, that the response to the rule is insufficient. The party is guilty of contempt, and the rule made absolute.

The appellee admits its disregard of the injunction, but for further defense says that since that time it has become impossible for it to furnish the appellant with the prices of stocks, produce, etc. That it has been forbidden from so doing by the board of trade, under whose control it is acting.

The court is not fully informed as to this fact, or as to the relation of the appellee to the board of trade, and, therefore, other affidavits may be filed as well as counter affidavits. If such a state of fact is found to exist, it may reduce the punishment for the contempt to the payment of costs only.

Commonwealth v. Still.

CASE 41—INDICTMENT—OCTOBER 18.

Commonwealth v. Still.

APPEAL FROM BALLARD CIRCUIT COURT.

1. **INDICTMENT—FALSE SWEARING.**—The provisions of section 184 of the Code, as to the requisites of an indictment for perjury, do not apply to an indictment for false swearing, it being sufficient in such an indictment to charge that the accused willfully and knowingly swore, deposed or gave in evidence that which was false in a matter which was judicially pending, or on a subject on which he could be legally sworn, or on which he was required to be sworn. Nevertheless, proper allegations of the falsity of the testimony of the defendant are as necessary in an indictment for false swearing as in an indictment for perjury, and it is not sufficient to allege in general terms that the statements of the defendant as a witness were false, but the matter alleged to have been sworn to must be negatived by special averment.
2. **CASE ADJUDGED.**—It being charged in an indictment for false swearing that the defendant testified falsely that he did not see a game of cards played at a particular time and place, it was not sufficient to state merely that his statements were false, and known by him to be false, but it should have been averred that the accused did see the game of cards played at the time and place mentioned.

P. W. HARDIN, ATTORNEY-GENERAL, FOR APPELLANT.

The indictment is sufficient. The offense is properly charged, and the allegations of facts constituting the offense are definite and specific.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The Commonwealth appeals from the judgment of the lower court sustaining a demurrer to the following indictment:

“The grand jurors of the county of Ballard accuse Thos. H. Still of the crime of false swearing, committed in manner and form as follows: The said Still did, on the ninth day of October, 1883, before the finding of this indictment, in the county aforesaid, on

83	275
92	458
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122	879

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his examination as a witness, after being duly sworn to testify the truth on the trial of a cause of the Commonwealth of Kentucky, plaintiff, and T. P. Clark, defendant, then pending by indictment concerning the violation of the tavern bond of said Clark, which court had authority to administer said oaths, and after which the said Still did falsely and corruptly testify that he did not, between the twentieth day of June, 1881, and the twenty-second day of April, 1882, see a game or games of cards played in the tavern-house, or in the saloon of the said Clark, in which game or games of cards so played money nor property of value was bet, won nor lost, when T. P. Clark was present, or had any knowledge or information of the same so far as he, Still, knew. Nor did he testify before the grand jury of this county, when R. W. Shelbourne was foreman of the same, that he, Still, saw a game of poker played in Clark's hotel, at Wickliffe, when T. P. Clark, proprietor of the house, was engaged in the game upstairs in said building, where money or property was bet, won or lost, or when Clark was present. All which statements were false and known to be by said Still to be false at the time, and was willfully and corruptly made and testified to, said Ballard Circuit Court having jurisdiction and authority to examine into said charge against T. P. Clark," etc.

The Criminal Code requires an indictment in every case to be direct and certain as regards the party charged, the offense charged, the county in which the offense is committed, and the particular circumstances of the offense charged, if they be necessary

to constitute a complete offense. (Section 124.) And in section 134 it is provided, that "in an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned," etc.

In an indictment, however, for false swearing, it is sufficient to charge that the accused willfully and knowingly swore, deposed or gave in evidence that which was false in a matter which was judicially pending, or on a subject in which he could be legally sworn, or on which he was required to be sworn. Nevertheless, proper allegations of the falsity of the matter on which the false swearing is assigned are as necessary to be made as are required in an indictment for perjury. In each case the indictment should be direct and certain as to the falsity of the oath taken, which, in both cases, must be knowingly and willfully made.

It is a settled rule in criminal pleading that an indictment for perjury must negative by special averment the matter alleged to have been sworn to by the accused. (Archbold's Criminal Practice and Pleading, volume 2, page 965.) And we see no reason why the same rule should not be applied as a test of the sufficiency of an indictment for false swearing. For in each case the issue is, whether the accused has, on the matter about which he could

be legally sworn, willfully and knowingly sworn falsely. According to that rule, we think the indictment is defective.

It is sufficiently stated that the oath was taken before a court authorized to administer it, and on a subject in which the accused could be sworn; but instead of negating each or any of the statements of the accused as a witness by special averments, a general and sweeping charge is made in the indictment that they were all false and known to be false by him.

It should have been specially averred, if it could truthfully, that the accused did see the game of cards played at the time and place mentioned, that money or property was then and there bet and won or lost, and that the accused did know Clark had knowledge or information of the game.

As to the attempted charge that the accused testified falsely before the grand jury, it is impossible to say, if the indictment is construed according to rules of grammar, whether the statement that the accused did not testify to the facts mentioned is to be considered as made on oath by him, or as a declaration or assertion in behalf of the Commonwealth. But waiving this objection, there is no averment that he did testify before the grand jury at any time or about any matter.

For the reasons indicated, we think the indictment is fatally defective, and the judgment sustaining the demurrer to it is affirmed.

Roberts v. Davidson.

CASE 42—MANDAMUS—OCTOBER 14.

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Roberts v. Davidson.

APPEAL FROM PULASKI CIRCUIT COURT.

1. INJUNCTIONS do not interfere with the rights of third parties who have acquired them in good faith, and who are not parties or privies to the proceedings.

An injunction restraining a county surveyor from making a certain survey having been granted in a proceeding to which the surveyor alone was made a defendant, the party claiming the right to have the survey made is not bound thereby, and, if there is no other obstacle, he may have a mandamus to compel the surveyor to make the survey.

2. PATENTS VOID FOR UNCERTAINTY.—While a patent with such sweeping lines as to include within it a large boundary of both vacant and already appropriated lands, without identifying or locating the latter, can not be sustained, land embraced in such a patent can not be appropriated as vacant land without further legislation.
3. IT IS THE DUTY OF THE SURVEYOR, when applied to, to make entries for persons holding warrants from the county court, and to survey entries in the order in which they are made; and he can not be heard to say that one is not entitled to a survey because no entry has been made, when it was his duty to make the entry.

JAMES DENTON FOR APPELLANT.

1. The Stewart and Porter patent is void for uncertainty, the excluded lands not being described. (*Hamilton v. Fugate*, 3 Ky. Law Rep., 158.)
2. The patent being void for uncertainty, the judgment prohibiting the surveyor from surveying within its uncertain bounds is also void for uncertainty.
3. It was never intended that injunctions should interfere with the rights of third persons who, in good faith, have acquired such rights. (*Hilliard on Injunctions*, 23; *Ibid.*, page 186, and cases there cited; *Heininingway v. Preston, Walk.* (Mich.), 528.)
4. A surveyor is an officer of the county, and it is his duty to execute the orders of the county court, and as a warrant from the county court is in the nature of an order to survey for the party holding it, the circuit court has no power to enjoin the surveyor from making the survey, and he may disregard such an injunction. (*C. & O. R. R. Co. v. Judge of Washington County Court*, 10 Bush, 564.)

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5. It is the duty of the surveyor to make the entry (General Statutes, chapter 40, article 3, section 1), and it is also his duty to survey the "entries in the succession in point of time in which the same are made." (General Statutes, chapter 109, section 3.)

JOSEPH E. HAYS ON SAME SIDE.

1. The Stewart and Porter patent is void for uncertainty. (Hamilton v. Fugate, 3 Ky. Law Rep.. 158.)
2. The Stewart and Porter survey is void, because it was not made in accordance with the sixth section of the act of 1815, on the subject of appropriating lands, or with any subsequent statute directing how surveys are to be made. Nor was it made in accordance with General Statutes, chapter 103, section 3, page 818.
3. As records are only binding on parties and privies, the injunction against the surveyor, if not void, does not bind appellant.

O. H. WADDLE FOR APPELLEE.

1. The decision in Hamilton v. Fugate (3 Ky. Law Rep.. 158) does not apply, for the reason that the patent in this case does not recite that the excluded lands have been previously granted.
2. The excluding clause in the patent is an exception and not a reservation (Shepherd's Touchstone, 80), and the exception and not the patent is void for uncertainty. (4 Cruise's Digest of Law of Real Property, chapter 21, section 66 vol. 2, page 226; Greenleaf's Evidence, vol. 2, page 77; 1 Shepherd's Touchstone, page 79.)
3. The plaintiff had made no entry appropriating any vacant land, as the statute required him to do, at the time he demanded the survey to be made. (General Statutes, chapter 109, sections 2, 3.)
4. The injunction against the surveyor precludes the court from granting the relief asked. An injunction, though improperly issued, must be respected so long as it remains in force. (Hilliard on Injunctions, pages 177, 185.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellant, Alvin O. Roberts, obtained from the Pulaski County Court on March 14, 1881, a warrant to survey and appropriate one hundred and fifty acres of vacant land; and on the same day he presented it to the deputy of the appellee, who was the county surveyor, and it was entered by the former in his entry book; but the entry did not describe the land, although the testimony tends to

show that the appellant then gave him a general description of it.

On March 15, 1881, one Gorman and others had the deputy make several surveys, which, perhaps, embraced the land, or a part of it, which the appellant had sought to appropriate; but no entry was ever made in the surveyor's entry book as to the warrants under which they were made. J. W. Parker and others on March 16, 1881, sued out an injunction from the Pulaski Circuit Court against the appellee alone, enjoining him from making any of the surveys above named, or any plats or certificates thereof, or recording the same; and no answer being filed, the allegations of the petition were taken *pro confesso*, and the injunction made perpetual on April 2, 1881.

It was based upon the alleged ownership of the land by the plaintiffs in that suit under the Stewart and Porter patent, dated May 12, 1851, which purported to convey to the grantees therein named a thousand acres; and which, after giving a certain boundary, contained this exclusion, without any further words descriptive of it:

"There is 21,520 acres excluded the above boundary."

It is admitted by the pleadings that the land which the appellant is seeking to appropriate is not within the exclusion. He brought this action on September 13, 1881, to obtain a mandamus to compel the appellee to make the survey under his warrant. It is urged in defense, that being embraced by the patent *supra*, it was not vacant land; that there had been

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no entry made in the surveyor's entry book giving a description of it; that it had already been surveyed for Gorman and others; and that the appellee had been enjoined from making it.

The appellant had the elder warrant. No entry whatever as to the surveys made for Gorman and the other parties had been made in the surveyor's book; and it was his duty to make those that were first entered. It was also his duty to make the entry, and in it to give the description of the land to be surveyed, if the appellant furnished it to him. The law so contemplates, because it allows the officer a fee for making the entry; and he can not be heard to say that the appellant is not entitled to the survey because he (the appellee) failed to do his duty.

It is said that, even admitting that the injunction was erroneously granted and then perpetuated, that yet it can not be questioned collaterally in this action.

Undoubtedly, an injunction must be respected while in force, although it may have been improperly granted; but it is equally the rule that it can not affect the rights of one who was not a party or a privy to the proceeding. In this instance, neither the State nor the appellant was a party to the injunction suit; and the surveyor was uninterested, save to the extent of doing the work.

Injunctions do not interfere with the rights of third parties who have acquired them in good faith, and who are not parties or privies to the proceeding; and if the appellant were otherwise entitled to

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the mandamus, it would be a sufficient response by the surveyor to any charge of contempt of the injunction to say, that since it was granted a court of competent jurisdiction had, in a suit involving the right of a person who was not a party to the injunction suit, directed him to do what he had before been forbidden to do.

It is evident that the land which the appellant seeks to appropriate has been once patented. Even if the pleadings did not admit that it is a part of the one thousand acres, yet the survey upon which the Stewart and Porter patent was based says: "There is 21,520 acres of *surveyed and patented* land in the bounds of this survey which is excluded from the calculation;" so that it is manifest that there was no land within the boundary that had not at some time been granted away by the State upon sufficient consideration.

A question of some difficulty now presents itself. The spirit of our law as well as public policy forbids an appropriation of vacant lands without regard to the rights of others. A patent with such sweeping lines as to include within it a large boundary of both vacant and already appropriated lands, without identifying or locating the latter, would lead to much litigation; and by reason of its uncertainty can not be sustained, either upon principle or by precedent.

Upon the other hand, if in such a case any one could appropriate it as vacant land, not only would injury often result to the honest occupant or owner, but every man would attempt to judge of the valid-

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ity of a patent, and then attempt to appropriate the land embraced by it if, in his opinion, it was void. Claims would thus arise which would infest the land like the locusts of Egypt.

Section 3, chapter 109 of the General Statutes, and under which the appellant was proceeding, provides:

"Every entry, survey or patent made or issued under this chapter shall be void so far as it embraces lands previously entered, surveyed or patented. * * * * No land shall be subject to appropriation under this chapter that has reverted to the Commonwealth by escheat, or has been forfeited for an omission to list the same for taxation, or failing to pay the taxes thereon, or which has been once patented, and the title of the same has in any way become again vested in the Commonwealth."

It may be said that the statute *supra* relates only to cases where the title has in fact passed out of the Commonwealth, and not to a void patent; but in our opinion the State, having by its officers issued the patent, and although by some defect it may be void, yet the statute precludes others from entering upon or appropriating the land without further legislation. Such entries are prohibited for the protection of those who may have obtained the patent in good faith, or who have derived title to their homes through it and an honest purchase; and while the title under these circumstances remains in the State, the land can be appropriated only by the aid of further legislation.

In the case of *Kirk v. Williamson*, 82 Ky. Rep.,

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page 161, the appellant, Kirk, attempted to appropriate a portion of a tract of land which was claimed by Williamson under a patent, upon the ground that it was vacant by reason of the patent being void for uncertainty. While the question now under consideration was not, perhaps, directly presented in that case, as there the patent was held sufficiently certain to be valid, yet the court said, that if it were void, yet the land embraced by it could not be appropriated as vacant under the statute.

Any other construction of it would create a constant source of contention, and countenance a practice of hunting out defects in patents; and then, although the State has received pay for the land, deprive the patentee, who has honestly entered and paid for it, or those holding under him in good faith, of it.

As the appellant could not appropriate the land in contest as vacant, although the Stewart and Porter patent is void, it necessarily follows that a court ought not to order an officer of the State to do an act tending to such a result.

Judgment affirmed.

CASE 48—PETITION EQUITY—OCTOBER 15.

Bainbridge v. City of Louisville.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **NEGOTIABLE INSTRUMENTS—LOST BONDS.**—Where the maker of negotiable paper pays it after notice of its loss by the owner, he is liable to the owner unless he can show that he paid to a pur-

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chaser for value who purchased in good faith before maturity; and he is liable even though the payment was made to a *bona fide* holder and without notice of the loss, if it was made after maturity, as the paper had then lost its negotiable character.

These rules applied in an action to recover of the maker the interest on municipal bonds which had been stolen from the plaintiff, the original owner, some of the coupons having been paid by the defendant when they were overdue, after notice of the loss of the bonds.

2. REMEDY TO PREVENT PAYMENT OF LOST BONDS.—Ordinarily, where negotiable paper has been lost by the real owner, he may tender a bond of indemnity, which, when approved by the court, will authorize payment to him by the maker; but in this case, the bonds in controversy being thirty-four in number and not maturing for many years, and the interest coupons falling due semi-annually, to apply this rule would multiply litigation between the maker and the holders, so resort must be had to some other remedy. The parties being already in a court of equity, an amendment to the petition asking for an injunction restraining the maker from paying the bonds or coupons to any claimant until his right as against the plaintiff, the real owner, is determined, with an order requiring the maker to make each claimant a party as the bond or coupon is presented so that he may litigate with the plaintiff, would be a more effectual mode of securing the rights of all; but the litigation to determine the rights of future claimants should not be at the cost of the maker.

WM. LOW, TEMPLE BODLEY, A. M. RUTLEGE FOR APPELLANT.

Brief not in record.

T. L. BURNETT FOR APPELLEE.

Where the maker of negotiable paper which has been lost or stolen pays it to an innocent purchaser for value, who took it before maturity, he is not liable to the original owner. In this respect municipal bonds are upon the same footing as other negotiable instruments. (*Caruth v. Thompson*, 16 B. M., 575; *Story on Promissory Notes*, 148; *Chitty on Bills*, 277; *Story on Bills*, 207; *Burroughs on Public Securities*, page 359; *Battle & Webster v. Landenslager*, 84 Pa. St., 446; *City of Elizabeth v. Foree*, 29 N. J. L., 587; *Birdsall v. Russell*, 29 N. Y., 220; *Commonwealth v. Emigrants' Industrial Savings Bank*, 98 Mass., 12.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The city of Louisville, under legislative authority, issued five hundred of its bonds, payable to bearer,

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for one thousand dollars each, bearing six per cent. interest, with coupons attached, for semi-annual installments of the interest. There were sixty coupons annexed to each bond, the principal sum not falling due for many years. The bonds were placed upon the market, and Bainbridge, the father of the appellant, to whom forty-one of the bonds were sold, instituted the present action, in his life-time, to recover the interest coupons that had matured and were unpaid. The appellee refused to pay the interest due, on the following state of fact: Bainbridge had deposited the bonds for safe-keeping in the vaults of the First National Bank of Baltimore, and on the night of the 19th of August, 1872, the bank was entered by burglars and all the bonds of the appellant, together with many other securities, stolen. The loss of the bonds, with a full description of their character, in the form of a circular, was sent to all the principal cities in this country, as well as the leading banking institutions, and every step taken by those sustaining the loss that was necessary, or could well be done, to prevent the purchase of the bonds from the thieves.

Notice was also given to the appellee (the city of Louisville) and to the Bank of America, its fiscal agent, in New York. They were notified not to pay the bonds or coupons to any one but the appellant. The city, as the record shows, proceeded to pay off these coupons, or some of them, to the parties presenting them; some before they were due and others after maturity.

The appellant, Bainbridge, when he instituted this.

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action to recover the interest on the bonds, tendered to the city a bond of indemnity securing it against loss, by reason of any payment the city might make to him. The bond was, in fact, tendered before the suit was filed. The bond was refused, and hence this action.

It is contended by the appellant that the appellee having had notice of the theft of these bonds, and that he was the owner, before the city could pay any of the coupons or bonds, the party presenting them for payment should have been required to show that he was a *bona fide* holder; that he had received it in the usual course of trade, before maturity, and for a valuable consideration. This is the principal question raised by the pleadings. Seven of the forty-one bonds purchased by the appellant from the city have been recovered, and are not involved in this litigation. During the progress of the action the original plaintiff died, and his daughter, Eliza Bainbridge, is now the sole beneficiary, and prosecutes this appeal.

The bonds and coupons having all been made payable to bearer when the holder demanded payment of the bank, the presumption is that he acquired the paper in good faith, in the usual course of business, and upon a valuable consideration; and unless the notice to the city that appellant was the real owner, and the bonds had been stolen from him rebuts this presumption, and places the city on inquiry, the judgment below in favor of the city was proper.

There should be some remedy afforded the *bona*

fide owner of such paper, who loses it from his possession by theft or otherwise, for its recovery, or such relief as will prevent the maker of the paper from paying it to the holder when he presents it, until he shows that he is an innocent holder, and this being done, the original owner is without remedy.

It is a reasonable rule we think, and one that may be regarded as settled, that when the theft has been shown, the presumption is that the paper is still in the possession of the thief, and a subsequent holder, other than the original owner, when he demands payment, should be required by the maker, before payment, to show that he is in good faith entitled to the money. This rule, of course, applies where the maker of the paper has actual notice of the loss.

The universal doctrine of the text-books on the subject is, that the maker is liable to the owner of the paper after notice of the loss, if he pays the money on the paper to another without requiring the latter to establish a clear title in the event it subsequently appears that he was without title. (2 Parsons on Notes and Bills, page 256; 2 Daniel on Negotiable Instruments, section 1461; Byles on Bills, page 298; Edwards on Bills, section 434.)

While the rule requiring such inquiry may work some inconvenience to the maker of the paper, still it is better that he should suffer this temporary annoyance than to deny the real owner all remedy when he has lost the evidence of the indebtedness, and for no other reason than that the paper lost is a negotiable instrument.

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Daniel on Negotiable Instruments says:

"When, however, the loss by the original owner or the theft from him is proved, the burden of proof shifts, and the holder must show that he acquired it *bona fide* for value and before maturity, or from some one who had a perfect title." (Volume 2, section 1470, 3d ed.)

In the case of *Hinckley v. The Union Pacific Railroad Company*, 129 Mass., 52, involving a similar question, this doctrine of the text-books was fully recognized, and there has been no authority adduced by the appellees sustaining or even intimating a contrary rule.

It was incumbent on the city of Louisville in this case, having had undoubted evidence or notice of the loss of this paper, to show, when payment had been made after the loss and notice thereof, that the holders were purchasers in good faith before maturity and for value.

The mere belief that the party presenting the paper was an innocent holder is not sufficient. The notice of the loss placed the city upon inquiry, and as to those coupons paid, a perfect title in the holder must be shown. The fact that the law may presume the holder of such paper to be a transferee for value, affords the maker no protection when the paper has been lost by the original owner, and notice brought home to the maker before payment. "The onus of proof to show that he came honestly by the bill or note lies on the plaintiff; it is cast upon him by proof of the instrument's having been lost by accident or theft." (Edwards on Bills, section 438.)

“But when the defendant in such suit has proved that the instrument was obtained by illegal means or by fraud, felony or loss, or has since been the subject of fraud, felony or loss, then the holder must take up the burden of showing that he gave value for the instrument.” (Parsons on Notes & Bills, 2d ed., 280.) In this case the evidence of payment by the bank to those holding the paper is not satisfactory on the subject of title, and therefore the Chancellor should have entertained the petition in order to grant the relief. Some suggestion has been made by a witness for the appellee to the effect that he was secretary of the sinking fund, and had to pay, by the direction of the presiding officer, these coupons, or that they were paid by order of the sinking fund commissioners; further, that suits were instituted and a recovery had on some of the coupons against the city. It does not appear what defense was made by the city to the recovery, or that the appellant or those representing him were notified of the pendency of those suits, or that they were his coupons. Payment to a party *who claimed* to be a *bona fide* holder, after notice of loss to the maker, is not sufficient to protect him against the claim of the real owner. He must not only assert his claim, but establish his title, such as would satisfy an ordinarily prudent business man that he was the holder in good faith for value.

The appellee is attempted to be made liable for the payment of coupons that were overdue when presented. To what extent coupons were paid, after maturity, by the appellee, on bonds owned by the

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appellant, does not fully appear, but it is certain that if payment was made of an overdue coupon, it had then lost all its virtue as negotiable paper, and should be regarded like any other chose in action. It can not be presumed in such a case that the holder is in good faith, and entitled to the money. The maker pays it at his peril, and particularly in a case where he has notice of the loss by the real owner; but even without notice of the loss, the fact that the paper is overdue is such a notice of the want of title as will place the party who is about to purchase it, or the maker of the paper, on inquiry.

This case must go back for further proceedings, and the difficulty arises on the return of the case as to the mode of procedure, so as to give relief to the real owner without injury to the maker or the innocent holder. We think it is well settled that ordinarily a bond of indemnity may be tendered, and when approved by the court will authorize the payment of the bonds or the coupons, by the maker, as they mature, to the real owner.

Here, however, is a case where the bonds do not mature for many years, and the interest coupons falling due semi-annually. The bonds in controversy being thirty-four in number, with over two thousand coupons attached, may to-day be in the hands of as many different holders, and to require the payment of each coupon as it falls due by the city to the appellant upon a bond of indemnity, would subject the city to a litigation with each holder when the coupon was presented.

Daniel on Negotiable Instruments says:

"The parties liable upon a bill or note are entitled to its production and surrender before payment; but as this is physically impossible when it has been lost, the owner should, and must, tender a sufficient indemnity in some form against any future claim by a finder or holder upon the lost instrument. This indemnity is not, in the nature of things, as adequate a protection as the delivery of the instrument to the payer, but it approximates it as nearly as practicable." (Volume 2, section 1480.)

The application of this rule would multiply litigation to such an extent in the present case with the city, who is the mere stakeholder between the original owner and the claimant, as must suggest to the mind of the Chancellor some other remedy less burdensome to the maker of the paper, and at the same time affording greater protection to all the parties.

The parties are now in a court of equity, and the bond of indemnity is in effect a bond to protect the city and the innocent holder from loss. An amendment to this petition, asking for an injunction against the city to prevent it from paying these bonds to any claimant until his right as against the original owner is determined, with an order requiring the city to make each claimant a party as the bond or coupon is presented, so that he may litigate with the real owner, would, it seems to us, be a more effectual mode of securing the rights of all. If the appellant can give a bond of indemnity, he can give an injunction bond, conditioned so as to fully indem-

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nify the city. With the case kept on the docket, each claimant, having one or more bonds or coupons, may litigate to the extent of his interest without delay, and the case as to the other bonds or coupons not presented, or about which no litigation is had, continued, that future claimants may be heard. The money due can be loaned by the Chancellor, in his discretion, giving the preference to the original owner. A re-issue of the bonds and coupons should not be required, conceding that the Chancellor could exercise such a power. Such a step would not only increase the danger to the city resulting from the loss of these bonds, for which it is in no manner responsible, but would greatly add to the litigation that must necessarily exist, as the case is now presented, for the protection of the rights of these parties. The Chancellor would not permit the appellant, if the bonds and coupons were re-issued, to place them on the market.

This case is in no preparation for a judgment for or against the city in regard to the coupons already paid. So far as the record shows, the appellant or his assignee has never been divested of his right or title. The evidence being insufficient of payment to an innocent holder, before maturity, for value, the burden, after notice, is on the city of showing that the coupons were paid to a *bona fide* holder. As to the coupons paid after maturity, such a payment does not relieve the city from liability to the original owner; but the difficulty in this case arises from the want of testimony establishing the payment of the coupons that belonged to the appellant after they

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had matured. This court cannot determine that question in the light of the record before us.

It is maintained by counsel for the appellant that payment before maturity, although to a *bona fide* holder, and particularly after notice of the loss, creates a liability on the part of the city to the extent of the coupons paid before maturity.

Parsons on Notes and Bills says that a payment before maturity, although without notice and to a *bona fide* holder, leaves the maker still liable to the loser because the payment is out of the ordinary course of business. (Volume 2, page 255.)

We are not disposed to follow this rule, or to apply it in a case like this. There can be no doubt but that a payment may be made before maturity, by the consent of both the creditor and debtor, and if so, the payments, before maturity, of these coupons to a *bona fide* holder releases the city from any obligation to pay the same coupons to the appellant. The holder of negotiable paper stands as the creditor, and the maker as the debtor. If acquired before maturity for value in the ordinary course of trade, the holder becomes invested with a perfect title, although the original owner or holder may have lost it, and if a *bona fide* holder, with the title perfect as against the original owner, presents the paper for payment, we see no reason why a payment to such a holder by the maker should not relieve the latter from all liability.

Daniel on Negotiable Instruments says:

"The debtor may of course pay the bill or note to any one who is the holder under an indorsement

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to himself personally, or an indorsement in blank at any time before maturity, provided the holder consents to receive payment," (Volume 2, section 1234.)

It at last depends upon the question as to whether the holder as against the maker is entitled to recover when the payment is made before maturity, and the burden is on the city to establish that fact as against the claim of the appellant.

The case will be remanded for additional proof, if any, offered on the merits by either side, and to allow appellant to amend her petition if desired, that complete protection may be had to all the parties in interest. If no further proof is taken, the appellant is entitled to a judgment for the coupons paid by the city, as there is a want of testimony showing that they were paid to a *bona fide* holder.

In this view of the case, the appellee city should not be required to pay to the appellant the interest coupons upon a mere bond of indemnity. The remedy suggested is ample for all the parties, and besides, the litigation to determine the rights of the future claimants, as between them and the appellant, should not be at the cost of the city.

The judgment below is reversed, and cause remanded for further proceedings consistent with this opinion.

Willoughby, &c., v. Motley.

CASE 44—PETITION EQUITY—OCTOBER 17.

83	297
94	321

Willoughby, &c., v. Motley.

APPEAL FROM ALLEN CIRCUIT COURT.

BASTARDS—AGREEMENTS TO MAKE THEM HEIRS.—An agreement by the father with the mother of a bastard to make the child his heir as if born in lawful wedlock does not entitle the child to inherit the father's estate in the absence of a compliance with section 17, chapter 81, General Statutes; nor does the fact that the father gave the child his name, reared him and held him out to the world as his child, confer upon the child the power to inherit his property.

WILKINS & SIMS AND EDWARD W. HINES FOR APPELLANTS.

1. The circumstances proved show an enforceable contract by the father with the mother of his bastard child to support the child, and make her his heir as if born in lawful wedlock. Such an agreement can be enforced by the child. (Clark v. McFarland, 5 Dana, 47; Burgen v. Straughan, 7 J. J. Mar., 583.)
2. Even if the agreement can not be specifically enforced, the child is entitled to recover for a breach of it. (Benge v. Hiatt's Adm'r, 6 Ky. Law Rep., 714.)
3. The proof shows that the father was prevented from making provision for his daughter, by will or otherwise, by reason of appellee's agreement to divide the estate with her. The appellee should, therefore, be treated as holding one-half of the estate in trust for his sister. (Perry on Trusts, section 181; Caldwell v. Caldwell, 7 Bush, 515.)

JAMES A. MITCHELL FOR APPELLEE.

1. The father, by treating his bastard daughter as if she were his legitimate child, and holding her out to the world as such, did not vest her with the right to inherit his estate. The statute points out the only way in which one person can be made the heir of another. (General Statutes, page 374.)
2. The plaintiffs fail to establish an agreement by the defendant to divide his father's estate with his sister; but if the agreement had been established it could not be enforced, the subject-matter of the contract having only a potential existence. (Wheeler's Ex'r v. Wheeler, 2 Met., 475.)
3. To enable either party to compel the specific execution of a contract, it must be mutually binding. (2 Mon., 345; 3 Bush, 697.)

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4. Part performance of a contract not founded on a valuable consideration will not bind the party to a full performance. (3 Bush, 298.)
5. The mere expression of a desire by the father that his illegitimate daughter should share in his estate as if an heir, does not impose upon the heir receiving the estate the burden of carrying into execution the desire of his ancestor. (Perry on Trusts, 2d ed., section 181.)
6. The case of *Caldwell v. Caldwell*, 7 Bush, 515, distinguished from the case at bar.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

This is an action by Sallie Willoughby and her husband, W. W. Willoughby, against E. C. Motley, only son and heir-at-law, and also administrator of the estate of James Motley, who died intestate, to recover judgment for one-half of \$1,560.39, the alleged balance found in his hands after settlement of his accounts, and for an equal division of the real estate left by the intestate.

It is alleged in the petition and amended petitions that Sallie Willoughby, about fifty-one years of age, is the illegitimate daughter of James Motley, deceased, and the judgment is prayed for upon two distinct grounds.

First, it is stated that, when she was between one and two years of age, James Motley, recognizing her as his child, and in consideration of the moral duty arising therefrom, and the further consideration that her mother would and did give him the possession and control of Sallie, agreed and promised to raise, educate, adopt, and make her an heir of his estate as if she had been born in lawful wedlock; and the plaintiffs say that, in pursuance of that agreement, he did take, rear, and gave her his name,

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and held her out as his child, which was, in effect, adopting and giving her power of inheritance as to his property.

In the second paragraph they say it was agreed between the deceased, the plaintiffs, and defendant, that, after the death of James Motley, his estate should be equally divided between Sallie and E. C. Motley, and by reason of that agreement and the promise of E. C. Motley that he would so divide the estate with her, upon which James Motley implicitly relied, the latter refrained from and was prevented making a will securing her a full share of his estate, which he intended to do, and would have done but for the deception and fraud of E. C. Motley, who, it is alleged, was well acquainted with the relation that existed between Sallie and James Motley, and of his intention and desire to provide for her an equal share of his estate.

There is evidence showing that when she was of tender age the mother of James Motley took Sallie from her mother and carried her home, and cared for and treated her as a grandchild, and that after the death of his wife, which occurred about two years after Sallie was removed there, James Motley also resided at his mother's house. And though there is some testimony that he, up to a short time before his death, denied that Sallie was his child, we are of the opinion the evidence establishes the fact that he not only treated, supported, and cared for her as his child, but recognized her as such.

But there is no direct evidence he ever made any agreement with her mother to raise and support

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Sallie, and the existence of such agreement can only be inferred.

We are not, however, authorized to infer, in the absence of proof, that the agreement, if it ever was made, amounted to an undertaking to adopt her as his child to the extent of making her capable of inheriting as his heir-at-law.

The only manner in which that might have been effectually and legally done is provided in section 17, chapter 31, General Statutes; and even if there had been a distinct and solemn agreement by him with her mother to make Sallie his heir-at-law, it could not be specifically enforced, as sought by the plaintiff in this action, a compliance with the terms of the section referred to being indispensable in order to establish such relation. No recovery in damages for an agreement violated is sought in this action, and even if it had been, there is not sufficient evidence to justify it.

The circumstances of this case do not authorize us to infer that James Motley ever agreed, if he made any agreement at all, to do more than maintain and support his bastard child, and the evidence shows he did do that up to the time she married, at the age of twenty-two years.

There is no evidence whatever to sustain the allegations contained in the second paragraph of the petition.

The plaintiffs do not prove that James Motley contemplated or intended at any time to make a will. On the contrary, two witnesses testify that he expressed an intention not to do so; nor is there any

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evidence showing, or tending to show, that E. C. Motley ever promised or agreed with his father to divide the estate equally with his sister, or that James Motley was influenced in the slightest degree to refrain from making a will by any thing done or said by E. C. Motley. It is unnecessary, therefore, to determine what would be the equitable rights of Sallie Willoughby in a state of case not shown by the evidence.

The division of the household and other personal effects by E. C. Motley with his sister, after the death of his father, can be construed as nothing more than a mere gratuity on his part, and does not prove or amount to an enforceable agreement to divide the land and money, one-half of which the plaintiffs seek to recover in this action.

Whatever moral claim the circumstances of this case show Sallie Willoughby had upon her father, and may now have upon her brother, it is not necessary for this court to determine. It is sufficient that she can not recover in this action as the record is presented.

Judgment affirmed.

CASE 45—PETITION ORDINARY—OCTOBER 22.

Houston v. Kidwell, &c.

APPEAL FROM PENDLETON CIRCUIT COURT.

NEW TRIAL—ADDITIONAL GROUNDS.—Where grounds have been filed and a motion for a new trial made within three days after verdict, the trial court may, after the expiration of the three days, permit

83	301
93	458
83	301
105	252
83	301
106	438

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additional grounds to be filed, when in the opinion of the court such additional grounds should be considered before the motion is disposed of.

J. W. MENZIES AND A. DUVALL FOR APPELLANT.

It was proper to allow the additional grounds for a new trial to be filed. The objection to them is technical, and should not be considered.

LESLIE T. APPELLEGE FOR APPELLEES.

The court has no power to allow additional grounds for a new trial to be filed after the expiration of the three days within which the motion for a new trial is required to be made, unless within the three days the court extends the time for filing additional grounds. (Civil Code, sections 342, 343; *White v. Crutcher*, 1 Bush, 478; *C. N. O. & T. P. R. R. Co. v. Barr*, 6 Ky. Law Rep., 450.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant having filed his grounds and moved for a new trial within three days after the verdict had been rendered, was permitted, after the expiration of the three days, to file additional grounds, and on an appeal to this court the judgment below was reversed upon one of the grounds assigned after the time had expired for making the motion for a new trial.

It is now insisted in a petition for rehearing that this court could not consider the additional grounds relied on for a reversal, the Code requiring that all the grounds shall be filed within the three days unless unavoidably prevented. We do not so interpret the provisions of the Code of Practice on this subject.

Section 342 of the Code provides that "the application for a new trial must be made at the term in which the verdict or decision is rendered, and except for the cause mentioned in section 340, subsection 7,

shall be within three days after the verdict or decision is rendered, unless unavoidably prevented."

It is plain, therefore, that under this section of the Code the application for a new trial must be made within the three days, unless there is some act done or omitted to be done over which the attorney or his client had no control, preventing the party from making his application. He must show, as an excuse for not making the application within the time, that it was unavoidable on his part.

Section 343 provides the manner in which the application shall be made; that is, "by motion upon written grounds filed at the time of making the motion," etc.

In this case the application was made within three days after the verdict; so section 342 has been strictly followed.

The application was by motion upon written grounds filed at the time of making the motion; so section 343 of the Code has been strictly pursued. This rule of practice is imperative, and cannot be dispensed with unless circumstances over which the party or his attorney had no control prevented it. In this case the appellant filed his application and made his motion within the time required, and then asked the trial court for leave to file additional grounds, and we see no reason why the court should have declined to entertain such a motion.

There is no provision of the Code of Practice preventing the court from permitting additional grounds to be filed before the motion for a new trial is disposed of; and it may often occur that the ends of justice require that such a practice should prevail.

Houston v. Kidwell, &c.

Under the former practice, assignments of error could not be amended or added to, save in exceptional cases, by reason of an express provision of the Code that confined both the court and the appellant to the particular errors assigned.

If a similar rule existed in the court below with reference to motions for a new trial, which are but assignments of error in that court, then both court and counsel would be confined to the consideration only of the grounds filed within three days after the verdict. Such is not the rule, and never has been the practice in the trial court. When the court below, in a re-examination of the record or the proceedings had, finds that an error has been committed to the prejudice of the party complaining, a new trial will be granted, although the error may not be specified in the grounds filed. If the court can exercise such a power, why should the suggestion of counsel, either in the form of a written motion containing other alleged errors or in an oral statement from the bar, be denied? When the case comes to this court, the written grounds will be looked to with a view of seeing if an opportunity has been given the court below to correct its judgment; but not so with the trial court. It is essential to the proper administration of justice that the court below should have complete revisory power over its proceedings, and it is the duty of that court during the term to correct such error, if any committed, as, in the judgment of the court, has affected the substantial rights of either party.

In order that justice may be speedily and promptly

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administered, and that the trial of issues of fact may be terminated during the term at which the trial is had, the unsuccessful litigant is required to apply for and file his written grounds for a new trial within three days after the verdict has been returned into court; and if he fails to do so, unless unavoidably prevented, he cannot prosecute his appeal from the verdict on the issue made before the jury to this court. This follows, because it is the plain letter of the statute; but at the same time the trial court may permit additional grounds to be filed after the original motion has been made, when, in the opinion of the court, such additional grounds should be considered before overruling the motion and entering a final judgment. As it was proper to permit the additional grounds to be filed in this case, the judgment below must stand reversed, and the cause is remanded for a re-trial.

CASE 46—PETITION EQUITY—OCTOBER 24.

Parsons, &c., v. Spencer, &c.

APPEAL FROM MARION CIRCUIT COURT.

1. AS A JUDGMENT AGAINST A MARRIED WOMAN MAY BE VALID, in a proceeding to enforce such a judgment it should not be held conclusively to be void, but the defendant should not be estopped from showing that it is void.
 2. UNCERTAINTY IN JUDGMENT.—A judgment which does not name the plaintiffs individually, but simply designates them as the "heirs" of a certain person, is not void for uncertainty.
 3. SUIT TO ENFORCE JUDGMENT—PLEADING.—The allegation that the plaintiffs recovered the judgment sought to be enforced against W. S. and E. S., "his wife," amounts to an allegation that E. S. was a *feme covert* when the judgment was rendered, and that the plaintiffs
- vol. 83.—20.

83	305
89	506
89	579

83	305
102	332

83	305
105	420

83	305
115	333

83	305
116	396

83	305
116	396

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in this suit are the same persons who were referred to as "heirs" in the judgment.

4. **VENUE OF ACTIONS.**—An action upon a return of no property found, pursuant to section 439 of the Code, may be brought in the county in which the defendant resides.

5. **TRUST ESTATES—LIABILITY FOR DEBT.**—Wherever there is a beneficial interest in property, it is liable for the debts of the beneficiary.

A testator devised all his estate to his daughter for life for her separate use, "not to be subject to or liable for debts or liabilities she may have or hereafter contract," directing his executor to make such investments as he should deem advisable, and to pay annually to the testator's daughter the profits of the estate.

Held—That the personal representative is to be regarded as a trustee for the testator's daughter, who is entitled to the income of the entire estate after the payment of the testator's debts, and while he should not be divested of the possession of the property, the court will, although the testator did not so intend, subject the use or income arising from it to the payment of any debt for which the *cestui que trust* is in fact liable, and direct the trustee or administrator to so apply it.

6. **MARRIED WOMEN—EQUITABLE SETTLEMENT.**—A married woman is not entitled to a settlement as against debts contracted by her; it is only where the husband is seeking to get possession of the property, or his creditors are trying to subject it, that such a claim can arise.

SAMUEL AVRITT FOR APPELLANTS.

1. As the judgment sought to be enforced does not show on its face that Mrs. Spencer was a married woman at the time judgment was rendered against her, that fact must be taken advantage of by plea and not by demurrer.
2. There are many cases in which it is proper to render a personal judgment against a married woman; therefore, the presumption is in favor of the validity of such a judgment.
3. If a judgment is not void, but merely irregular or erroneous, it can not be attacked collaterally. (*Watson v. Morrison*, 4 Bibb, 336; *McIlvoy v. Speed*, 4 Bibb, 85; *Wallace v. Usher*, 4 Bibb, 508; *Shackleford v. Miller*, 9 Dana, 274; *Bennington v. Reed*, 8 B. M., 103; *Hynes v. Oldham*, 3 Mon., 267; *Gardner v. Strader*, 5 Litt., 815; *Sanders v. Gatewood*, 5 J. J. Mar., 328; *Green v. Ball*, 4 Bush, 590; *Dunlap v. McIlvoy*, 3 Litt., 278; *Spalding's Adm'r v. Wathen*, 7 Bush, 662.)
4. A judgment against a married woman is binding until reversed. Coverture, like any other defense, must be relied upon. (*Fauntleroy's Heirs v. Crow's Heirs*, 5 B. M., 136; *Jarman, &c., v. Wilkerson*, 7 B. M., 294.)

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5. A suit under section 439 of the Civil Code, upon a return of "no property," may be brought in the county of the defendant's residence. (Civil Code, section 70; *Nixon v. Jack*, 16 B. M., 181.)
6. Whatever estate Mrs. Spencer took under her father's will is subject to the payment of her debts, notwithstanding the intention of the testator that it should be otherwise. (*Monroe and Harlan's Digest*, vol. 1, page 443, section 13; *Revised Statutes*, vol. 2, page 230; *General Statutes*, page 588, section 21; *Eastland v. Jordan*, 8 Bibb, 186; *Jones v. Langhorne*, 8 Bibb, 455; *Samuel & Johnson v. Ellis, &c.*, 12 B. M., 479; *Pope's Ex'rs v. Elliott, &c.*, 8 B. M., 62; *Samuel, &c., v. Salter, &c.*, 3 Met., 260.)
7. The separate estate of a married woman may be subjected to the payment of her debts. (*Jarman, &c., v. Wilkerson*, 7 B. Mon., 294; *Bell & Terry, &c., v. Kellar*, 18 B. M., 384; *Lillard v. Turner*, 16 B. M., 375; *Petty v. Malin*, 14 B. M., 247; *Johnston and Wife v. Jones*, 12 B. M., 329; *McClelland v. Hamilton's Adm'r*, 5 Ky. Law Rep., 58.)
8. The doctrine of equitable settlement has no application as against the creditors of the wife.
9. The failure of the judgment to give the names of the heirs in whose favor it was rendered does not render it void for uncertainty. (*Shackleford, &c., v. Fountaine's Heirs*, 1 B. Mon., 253.)
10. The whole estate devised to Mrs. Spencer, and not merely the yearly proceeds, may be subjected to the payment of her debts. (*Bowles v. Winchester, &c.*, 13 Bush, 1; *Samuel, &c., v. Salter, &c.*, 3 Met., 260.)
11. In any event, the annual rents and profits may be subjected. (*Young v. Miles*, 10 B. M., 289; *Montjoy v. Lashbrook*, 8 Dana, 83.)

HARRISON & BELDEN AND W. E. & S. A. RUSSELL FOR APPELLEES.

1. This action necessarily involves the settlement of the estate of a deceased person, and should, therefore, have been brought in the county wherein administration was granted. (Civil Code, title 10, chapter 3; *Bennett v. McCorcle*, 3 Met., 332.)
2. The provision in the testator's will that the estate devised to his daughter should not be subjected to the payment of her debts, was not a fraud upon her creditors, and should be regarded by the Chancellor.
3. Only so much of a married woman's separate trust estate as remains after furnishing her a support can be subjected to the payment of her debts. (*Alexander & Co. v. Owens*, 4 Ky. Law Rep., 621.)
4. The judgment sought to be enforced is void for uncertainty. (*Freeman on Executions*, par. 16; *Ordinary v. McClure*, 1 Bailey, 7; *Farmer v. Grant*, 10 Bush, 362; *Bridges v. Caldwell's Ex'rs*, 2 A. K. Mar., 618.)

Parsons, &c., v. Spencer, &c.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

This is an action brought by the heirs of Wm. P. Moore against W. H. Spencer and his wife, Eliza Spencer, and others, in the Marion Circuit Court, to enforce the collection of a judgment rendered in favor of the plaintiffs in the Taylor Circuit Court against W. H. and Eliza Spencer, as to which there had been a return of *nulla bona*, by subjecting to its payment whatever Mrs. Spencer acquired under the will of her father, W. M. Green. The petition alleges that the plaintiffs recovered the judgment "against the defendants, W. H. Spencer and Eliza S. Spencer, his wife." The copy of the judgment, filed with the petition, shows that it did not set out the names of the plaintiffs. The caption of it is "W. P. Moore's Heirs v. Susan Shepherd, &c.," and it is merely recited in the body of it that it is "adjudged that the heirs, plaintiffs in this action, recover of the defendants, W. H. Spencer and Eliza Spencer," &c.

We think that the averment, *supra*, of the petition amounts to an allegation that Mrs. Spencer was a *feme covert* when the judgment was rendered; and that the plaintiffs in this suit are the same persons who were named as "heirs" in the judgment.

The petition was dismissed upon a demurrer, the grounds of which are, first, that the Marion Circuit Court had no jurisdiction of the action; second, that Mrs. Spencer was a married woman when the judgment was rendered, and that it is, therefore, void; third, that the property interests acquired by her under the will of her father are not liable for her debt; and fourth, that the judgment does not show

in whose favor it was rendered, and by reason of its uncertainty can not be enforced.

This is not a suit to settle the estate of Wm. Green, but to subject to the payment of the plaintiffs' debt the interest acquired by Mrs. Spencer under her father's will. It is alleged in the petition that the defendants reside in Marion county, and this fact, under section 70 of the Civil Code, gave the Marion Circuit Court jurisdiction of the case.

It has been held, and we are not disposed to depart from the precedent, that a judgment which does not name the plaintiffs individually, but simply designates them as the "heirs" of a certain person, is not void for uncertainty. (*Shackleford, &c., v. Fountain's Heirs*, 1 T. B. Monroe, 252.)

It is true that a judgment, to be *in forma*, should show who has succeeded, what has been recovered, and from whom; or, in brief, what has been determined by the court; but in the instance just given, and that now under consideration, no injustice can be done, because, if questioned, certainty can easily be arrived at as to the persons in whose favor the judgment was rendered by the record or papers of the suit, and it is not void. The omission of their individual names in the judgment was a clerical misprision, which can be amended, if need be, by the original record.

The will of Wm. Green provides:

"I give and bequeath all my estate, both personal, real, and mixed to my only daughter, Eliza J. Spencer, during her natural life, for her own special and separate use, exclusive of her husband, and not to

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be subject to or liable for debts or liabilities she may have or hereafter contract, and at her death it is my wish and desire that all my estate not used or consumed, as hereinafter provided, descend to the children and grandchildren of my daughter, Eliza J. Spencer, if there should be any children or grandchildren of her's living. If not, it is then my desire that my estate be equally divided between the children of my sister, Sarah A. W. Neal. * * * *
My executor * * * * is fully authorized to sell and convey all or any part of my real estate, by and with the consent of my daughter, and to reinvest the same in real estate as a homestead for my daughter, with as much of my personal estate as he may deem advisable, and that he loan on interest my personal estate so as to make to best of his judgment the more profitable return, *paying annually to my daughter the profits of my estate.*"

There can be no doubt but what, under it, Mrs. Spencer was entitled to the income arising from the entire estate, and the entire beneficial interest in it, after the payment of the testator's debts. The personal representative is to be regarded as a trustee for her for this purpose; and while a court should not divest him of the possession of the property, it will, although the testator did not so intend, subject the use or income arising from it to the payment of any debt for which the *cestui que trust* is in fact liable, and direct the trustee or administrator to so apply it.

It is impossible for any one to hold a beneficial interest in property, and it not be liable for the

debts of the beneficiary. (General Statutes, chapter 63, article 1, section 21; Samuel, &c., v. Ellis, &c., 12 B. M., 479; Samuel, &c., v. Salter, 3 Met., 250.)

It is urged that the judgment can not be questioned collaterally, if valid on its face, as it was rendered by a court of competent jurisdiction; and that as Mrs. Spencer did not rely on her coverture as a defense to it, and has never moved to set it aside or appealed from it, that she is concluded, and can not now say, in this action to enforce it, that it is void.

In this we can not concur, although respectable authority differs with us. It is true that every presumption is in favor of the judgment, and that the *onus* is therefore upon the party impeaching it; but, in this instance, it may or may not be void. For aught that appears, it may have been rendered for the tort of the wife, or for a debt created by her before her marriage; or she may have been a *feme sole* at its rendition, and it therefore not void. Upon the other hand, if, for instance, it were based upon a note or obligation of such a character as would ordinarily support only an ordinary action, then as the note or obligation would be void as to her, a judgment on it against her would also be void.

In the case of Green, &c., v. Page, &c., 80 Ky. Rep., 368, the alleged liability originated while the Revised Statutes were in force, and when the *feme covert* could not bind her separate estate at all, and her general estate only for necessities, by writing, signed by her and her husband; and it was shown by the record in the case that the notes which she had signed were not for necessities; and it was

Parsons, &c., v. Spencer, &c.

said that a personal judgment against her would have been a nullity. By the common law the existence of the wife is merged in that of the husband; and she can make no contract whatever rendering herself liable to an action. In equity, however, by the English rule, she is treated as possessing in a great degree the power of a *feme sole* as to her separate estate; and when it is shown that she intended to charge it by a contract, although void in law, yet by the English decisions it may be enforced in equity against it; but she incurs no personal liability by virtue of the contract, and it must be satisfied out of the *corpus* or profits of her separate estate.

We are aware that it is a general principle that a party can not impeach a judgment upon any ground which might have been pleaded as a defense; and that it has been said that, in order to insure safety to a purchaser at a judicial sale, made under a judgment rendered against a female defendant, after due service of process, she can not be heard to say collaterally, or in another action, that she was married when the judgment was rendered, or incapable of contracting the alleged debt upon which it was rendered.

If, however, as is unquestionably true, a judgment is void if the court rendering it had no jurisdiction for want of service of process, then it seems to us that it should be equally so if the one served with process is incapacitated by law from retaining an attorney, or has no such legal existence as authorizes a personal liability. In the one case the court

has no jurisdiction, and in the other there is nothing within its jurisdiction which has a legal existence. By the judgment the alleged liability is simply placed upon a higher footing; and if before this it was void as to her, then the unauthorized judgment should not prejudice or conclude her, because she was not *sui juris*, and had no such legal existence in court as authorized a personal judgment.

This is the rule adopted by the courts of Missouri, Maryland, Pennsylvania, and perhaps other States. In the last named one a *feme covert* is liable upon certain contracts relating to her separate estate, and valid judgments may be rendered upon them; and it has been held by its courts that every judgment against her which does not show her liability upon its face is void.

In this State, whether a personal judgment may be rendered against her depends upon her legal status, and the character of the claim; and although it may not show upon its face facts sustaining its validity, yet, as the legal presumption is in its favor, it should not, in our opinion, be, therefore, held conclusively to be void; but, upon the other hand, she should not be estopped from so showing.

Section 518 of our present Civil Code, unlike section 579 of the old one, expressly excepts coverture as a ground for the vacation of a judgment by reason of erroneous proceedings; and the case of Spalding, Adm'r, &c., v. Wathen, 7 Bush, 659, did not involve the question now under consideration.

Undoubtedly a married woman may often be bound by a judgment; but when it imposes upon her a

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personal liability, it may or may not be void under our law, according to the character of the transaction upon which it is based, or her legal status at the time of its occurrence, or when the judgment is rendered; and unless this is shown by the petition (and it is not in this case) the question cannot be raised by a demurrer, but a plea is necessary.

It is suggested that if the income of the devised estate is liable for the plaintiffs' claim, that Mrs. Spencer would first be entitled to a settlement or a support. We do not mean to intimate whether it is or is not liable; indeed, from the present state of the record, we can form no opinion upon this question; but if liable, then, as against it, she is not entitled to any settlement. Such a claim could only arise if her husband were seeking to get possession of the property, or his creditors were trying to subject it to their debts.

The judgment below is reversed, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

88	314
87	404
83	314
81	427

CASE 47—PETITION EQUITY—OCTOBER 24.

Macklin, &c., v. Northern Bank of Kentucky.

APPEAL FROM KENTON CHANCERY COURT.

SURETIES—SUBSTITUTION OF CREDITOR.—Where property is pledged by a stranger to *indemnify* a surety, and not with the intention that it shall be applied to the payment of the debt in order to relieve the surety, it can not be subjected by the creditor, nor can the surety

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subject the property until he has shown that he has sustained loss, or is in such a condition as that loss must be necessarily sustained.

In this case the surety, against whom judgment has been rendered, being insolvent, property mortgaged to him by the daughter of the debtor to save him harmless can not be subjected either by him or by the creditor.

O'HARA AND BRYAN FOR APPELLANTS.

1. Equity will not subrogate the creditor to an indemnity given the surety by a stranger, unless it be under circumstances of inducement to the creditor to extend the credit upon the faith of the indemnity, at the instance of the party giving the indemnity, thereby creating a priority between the stranger and the creditor. (Cooper, &c., v. Martin, &c., 1 Dana, 28; Francis v. Smith, 1 Duvall, 124.)
2. The surety can not subject the property mortgaged to indemnify him until he has paid the debt or some part of it. Recovery of judgment against him is not sufficient.

McKEE AND FINNELL FOR APPELLEE.

1. The judgment in the former action between the same parties is not a bar to this action, as the two suits are wholly distinct and different.
2. The surety's cross-petition, charging that the release of the mortgage was obtained from him by fraud, having been taken for confessed, the mortgage should be treated as in full force, and the mortgaged property should, at the instance of the surety, be subjected to the payment of the debt the mortgage was executed to secure.
3. A petition being taken for confessed, every specific charge therein is admitted. (Lyme v. Beall, 7 Dana, 420; Atterberry v. Knox & McKee, 8 Dana, 284; Kendrick v. Fields, 2 Bush, 154.)
4. As to the power of the court, at a subsequent term, to set aside an order taking a petition for confessed. (Alexander, &c., v. Quigley, &c., 2 Duvall, 402.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

John J. Macklin gave to the Branch of the Northern Bank of Kentucky at Covington his note or bill, with P. Guilfoyle as indorser, for the sum of two thousand dollars. For the purpose of securing Guilfoyle as indorser or surety on the paper, and to indemnify him as such, the appellant, Mary E. Macklin, executed to him a mortgage on a lot of

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ground that she held in her own right, situate on Holman street in Covington. The paper at its maturity was protested, or at least has never been paid, and the liability of the indorser still exists, and the bank has prosecuted its claim to judgment.

The maker of the paper, as well as the surety, Guilfoyle, are insolvent, and the bank regarding the mortgage as a security for the debt, asks to be subrogated to the rights of the surety, and that the property be subjected to the payment of its judgment. Guilfoyle, to whom the mortgage was executed, at the instance, as he alleges, of the appellant and her father, executed to the appellant a release of the mortgage, reciting that he had received other indemnity that constituted a consideration for the release.

Having been made a defendant to the original petition filed by the bank, Guilfoyle, in his answer and cross-petition against the appellant, alleges that the release of the mortgage was obtained by fraud, and upon the statement by the appellant and her father that the debt had been satisfied. To the answer and cross-petition of Guilfoyle no answer was filed by the appellant.

The bank alleges that the father conveyed the property to his daughter, the appellant, in fraud of the rights of creditors, and seeks also to subject the property on that ground.

There is no evidence of any actual fraud in the transaction between the appellant and her father in the execution of the conveyance to her of the real estate sought to be subjected. The conveyance was executed before the debt was created by her father

to the bank, and, therefore, is not fraudulent as to the bank, nor is there any proof in the record showing the existence of a fraudulent purpose as to creditors.

If the failure to answer the cross-petition of Guilfoyle is an admission of a fraudulent purpose on the part of the appellant in obtaining the release of the mortgage, the question then presented is as to the right of recovery by the bank or Guilfoyle against the appellant by reason of the mortgage. It is not pretended that the appellant was in any manner liable for the debt to the appellee (the Northern Bank), or that the mortgage was executed by the appellant as a security for the debt. It is true that such is the statements in the petition of the bank and in the cross-petition of Guilfoyle, but the proof in the case, or, in the absence of proof, the exhibits evidencing the liability of the appellant, show that the only purpose on the part of the latter in executing to Guilfoyle the mortgage was to indemnify him as the surety.

There is no mistake alleged in the execution of the deed, or the subsequent writing by Guilfoyle, showing it to have been a mortgage, and, therefore, the only question is, did the appellant pledge her real estate as security for the debt, or did she mortgage it to the security to save him harmless in the premises?

The question, we think, can be readily answered. The contract or agreement as to indemnity between the surety and the appellant was purely personal, and intended to indemnify the surety, Guilfoyle, and for no other purpose.

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The mortgage was not designed as a security for the debt, but to indemnify the surety in the event he had the debt to pay. "*Upon being discharged or released from liability,*" the land was to revert to the mortgagor, the appellant.

The rule is, that when the security is given with the intention that it shall be applied to the payment of the debt in order to relieve the surety, or to enable the creditor to make his debt, he will be substituted to the rights of the surety; but when the pledge of the property is to indemnify the surety only against payment, it becomes personal, and presents entirely a different question.

When the case was in this court on a former hearing, at the instance of the bank seeking to be substituted to the rights of Guilfoyle, this court reversed the judgment below, for the reason that it created a contract between the appellant and the bank that before had no existence in making the mortgagor liable for a debt the surety had never paid, and when indemnity was to the surety alone and for no other purpose.

The creditor can be substituted where the surety holds the property as a mere trustee; that is, where the property is pledged to the surety for the payment of the debt. Such agreements and trusts, says Chancellor Kent, are "executed for the better protection of the debt, and a court of chancery will see that they fulfill their design." (*Kip v. Bank of New York*, 10 Johns., 63.)

The case, however, returns to this court in a different phase from that presented at the former

hearing. In this case the surety, Guilfoyle, is in court with a judgment against him for the debt, asking that his security for indemnity be subjected to its payment.

It is not, however, averred that the surety has ever paid one dollar of this debt, or that his property has been seized by order of the Chancellor for its payment; but, on the contrary, the record discloses the fact that Guilfoyle is insolvent, and that the bank is attempting to set aside the conveyance to the appellant by her father of this particular real estate on the ground of actual fraud.

This court has heretofore determined that, as between the bank and the appellant, there was no contract to pay this debt, and that the only purpose of the mortgage was to save the surety harmless in the premises. The mortgage is, in fact, an agreement on the part of the appellant that her property may be subjected to the payment of any loss he may sustain by reason of his undertaking, not that her property is to be subjected to the payment of a debt to the bank evidenced by an obligation upon which her name does not appear either as principal or indorser, but that if the surety has the debt to pay, he shall be indemnified out of her real estate.

The rule is well settled, that if the surety has obtained indemnity from his principal, the creditor may have his debt satisfied out of it; and if the indemnity is against a contingent liability, the creditor can not be substituted until the liability becomes absolute, that is, until the claim is reduced to judgment. Then the liability becomes fixed and certain..

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Nor will it be doubted that in such a case the surety, who is coerced by execution or made liable by the judgment for the debt, can proceed at once against his principal, and have the indemnity, whether in the form of realty or personalty, sold to pay the debt; and, in fact, we perceive no reason why the surety may not, when sued for the debt, even if the indemnity is upon the contingency of a loss to be sustained, when that indemnity comes from the debtor, proceed at once to have the debt satisfied out of the indemnity. It is the debtor's property, given to secure the surety, and being primarily liable for the debt, the Chancellor can do no wrong in subjecting it.

In this case, the party giving the indemnity is a stranger to the contract, and the indorser seeking indemnity comes into a court of equity utterly insolvent, and claims that he has sustained an injury, when it clearly appears there has been no breach of the covenant contained in the mortgage, or loss sustained. The surety, from his own showing, has not been damaged. He has paid no part of the indebtedness, and before the Chancellor will listen to his complaint, he must show that he has paid the debt or some portion of it, or that his property has been seized for its payment. It must appear that he has been damaged, or that he must sustain the loss by reason of the proceedings against him before he (the surety) can have relief.

Guilfoyle, when asking the Chancellor to enforce his claim for indemnity, shows that he is insolvent, and that the contingency upon which the appellant's

Little, &c., v. Ragan Brothers, &c.

liability depends has never happened. The Chancellor's decree in this case is, that the property be sold to satisfy the debt due the bank. We have already adjudged that the bank has no claim against the appellant, but at last the latter is made liable for no other reason than the insolvency of the principal and surety on the note to the bank.

The bank has no right to substitution, nor has the surety to the bank any claim against the appellant, until he shows that he has sustained loss, or that he is in such a condition as that loss must necessarily be sustained.

This he has failed to do; but, on the contrary, has placed himself in a condition where no loss is to be apprehended, and this affirmatively appears. As the case now stands, he is liable for the debt, and when he pays it, or shows that he has been damaged, then it will be proper for the Chancellor to indemnify him to the extent of the damage sustained, but not sooner.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

CASE 48—PETITION EQUITY—OCTOBER 29.

Little, &c., v. Ragan Brothers, &c.

APPEAL FROM GRAVES CIRCUIT COURT.

1. FRAUDULENT CONVEYANCES—ATTACHMENT.—A court of equity, by the levy of an attachment on property fraudulently conveyed, acquires jurisdiction to subject the property, as that of the grantor, to the plaintiff's debt, without a return of "no property," where
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the attachment is duly issued upon the ground that the defendant has disposed of his property with the fraudulent intent to cheat, hinder, or delay his creditors.

2. **NON-RESIDENTS.**—While the plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant upon the ground that he is a non-resident of the State, this fact is not alone sufficient to authorize a judgment setting aside a conveyance of his estate as fraudulent.
3. **EVIDENCE OF FRAUD.**—Where the parties to a conveyance, which appears on its face to be simply a conveyance without consideration, attempt to give a reason for its execution, which is contradicted by the facts, this fact may authorize the conclusion that the conveyance was actually fraudulent, although without the attempted explanation the conveyance might have been regarded as merely voluntary.

J. T. WEBB, D. G. PARK FOR APPELLANTS.

1. At common law could a court of chancery entertain jurisdiction in a suit attacking a conveyance as voluntary or fraudulent without a judgment and return of *nulla bona*, even though the debtor be a non-resident? (Comstock v. Rayford, 40 Am. Dec., 108; Zechorie v. Bowers, *Ibid.*, 111, 112.)
2. Our present Code and Statutes have abrogated all former statutory law on the subject. (Grigsby v. Barr. &c., 14 Bush, 380.)
3. The court can now entertain jurisdiction only when there is a judgment and return of *nulla bona*, or upon the grounds specified in subsection 7 of section 194, Civil Code. (Vance v. Campbell, 3 Ky. Law Rep., 449.)
4. In the case of Blalock v. Little, &c., the plaintiff alleges, but fails to prove, that the principal in the note, who is a resident of this State, is insolvent, and therefore fails to show an exhaustion of legal remedies. (Martz v. Pfeifer, 4 Ky. Law Rep., 595; Napper v. Yager, 3 Ky. Law Rep., 51.)
5. The debt of Ragan Brothers must be treated as one subsequent to the conveyance. The account was current until merged in the note, and, therefore, the credits must be applied to the payment of the debits in the account in the order of time in which they were made. (Kersey v. Bennett, 41 Am. Rep., 271; Miller v. Miller, 39 Am. Dec., 598.)
6. The date of the deed determines whether the debt is prior or subsequent, though unrecorded for a short time after its date. (Fletcher vs. Karl, 3 Ky. Law Rep., 385.)
7. The appellant could prove the agreement between father and son regardless of recitals in deed. (Beverley, &c., v. Noel, 4 Ky. Law Rep., 985.)

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ROBERTSON, SMITH AND ROBBINS FOR APPELLEES.

1. A court of equity has jurisdiction to set aside a conveyance as fraudulent where the creditor proceeds by attachment, although he may not have a return of "no property." (*Martz v. Pfeifer*, 4 Ky. Law Rep., 392; *Vance v. Campbell*, 3 Ky. Law Rep., 449.)
2. The fact that the debtor is a non-resident is alone sufficient to authorize the court to subject property which he has fraudulently conveyed. (*Scott v. McMillen*, 1 Litt., 302.)
3. A conveyance which is actually fraudulent is void, both as to prior and subsequent creditors. (*Haskell v. Wynne & Co.*, 3 Ky. Law Rep., 54; *Lowery v. Fisher*, 2 Bush, 70; *Doyle et al. v. Sleeper et al.*, 1 Dana, 533; *Farmers' Bank of Ky. v. Long, &c.*, 7 Bush, 337.)
4. The fact that defendants relied upon a false theory to find a consideration is strong evidence of fraud, and makes out more than a *prima facie* case against them.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in three consolidated actions subjecting to the payment of the respective debts of the plaintiffs a tract of sixty acres of land conveyed by the debtor, J. F. Little, to his two sons, J. S. and Joe Little, by deed executed February 3, 1880.

The first of these actions was brought by Leach, on a note given in 1876 by R. F. Jones and J. F. Little. The second by Ragan Brothers, on a note given September, 1880, by the firm of Little & Jones, of which J. F. Little was at the time a member. And the third by Blalock, on a note given in 1874 by N. W. & J. F. Little.

No personal judgment had, previous to the commencement of either action, been rendered in favor of the plaintiff against J. F. Little, and, of course, there had been in neither case an execution and return of no property found. But an attachment was, at the commencement of each, issued and levied

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upon the land, the plaintiffs stating substantially in their several petitions and affidavits, as grounds therefor, that the conveyance mentioned was made with the fraudulent intent to cheat, hinder, and delay the creditors of J. F. Little; that it was made without valuable consideration therefor, and that all the parties to it are non-residents of the State.

Under section 194, Civil Code, the plaintiff may, at or after the commencement of his action, have an attachment against the property of the defendant, upon the ground he is a non-resident of the State. This fact, however, is not alone sufficient to authorize a judgment setting aside a conveyance of his estate, because fraudulent in the meaning of chapter 44, General Statutes, and subjecting it against the claim of his vendees to the payment of the plaintiffs' debt. But it may be considered a rule settled by this court, that when statements are made in the petition or affidavit of the plaintiff, as provided in sub-section 7, section 194, Civil Code, and an attachment is thereupon duly issued and levied upon property thus alleged to be fraudulently conveyed by the debtor, a court of equity thereby acquires jurisdiction to subject the property to the satisfaction of the plaintiffs' debt, and may so subject it, if it is established by the proof that the conveyance was made to cheat, hinder, and delay creditors, or as to existing liabilities was made without valuable consideration. And the jurisdiction may be thus acquired and exercised even before the plaintiff has exhausted his legal remedy.

It is admitted that the debts of Leach & Blalock

were existing liabilities when the conveyance was made; but counsel for appellants contend the debt of Ragan Brothers was created subsequently.

It appears that the note sued on was given in September, 1880, by the firm of Little & Jones, to Ragan Brothers for the balance of a running account for goods sold by one firm to the other, beginning before and continuing for some time after the date of the deed; and there was at that time, in fact, a considerable amount due on the account. We are, therefore, of the opinion that, although the subsequent purchases of goods from time to time exceeded in amount the payments made, resulting in a somewhat larger balance due at the date of the note than there was when the deed was executed, the debt of Ragan Brothers should be regarded as an existing liability in the meaning of the statute. But this is not a vital question, if it be true, as alleged by the plaintiffs, that the conveyance of the sixty acres of land was made for the fraudulent purpose of cheating, hindering, and delaying the creditors of J. F. Little. For in that case the property in controversy is subject to the debt, whether created before or after the date of the deed.

It is alleged and attempted to be proved that in 1863 J. F. Little, the father, purchased for J. S. Little, his son, then about five years of age, another tract of land containing fifty-two and one-half acres, and had it conveyed to him. That previous to 1869 *Shadrach* Little, a brother of J. F. Little, had, without right, sold and conveyed that tract to one Morris, who sold to Cary. And in 1869 J. F. Little executed

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a mortgage upon a tract of one hundred and eighty-six acres, of which the sixty acres in dispute formed a part, to Cary, to secure him harmless in case J. S. Little, upon arriving at full age, should refuse to convey the title of the fifty-two and one-half acres to Cary. That J. S. Little, when he became of age, did convey that tract to Cary's vendee, and, thereupon, and in consideration therefor, J. F. Little conveyed the sixty acres to his two sons, J. S. Little and Joe Little, and not to the former alone.

This explanation of the consideration or reason for the conveyance of the sixty acres of land in February, 1880, is not only improbable, but is contradicted by the recitals of the mortgage, the deed from J. S. Little to Cary's vendee, and also the deed from J. F. Little to his two sons.

To accept it as true, we must not only believe, without any reason for it appearing, that J. F. Little caused made a deed of gift to his son when only five years of age, to the exclusion of his other children, of the fifty-two and one-half acres of land, but also that Shadrach Little, the brother of J. F. Little, afterwards wrongfully, and without any pretense of right, sold, received the consideration therefor, and attempted to convey the same land to Morris.

The deed for the fifty-two and one-half acres made by Smith in 1863 purports to be to *James Shadrach* Little, and was evidently intended to be to *Shadrach* Little, the brother, who paid the consideration, and not to J. S. or *James Shadrach*, the son of J. F. Little; and in the mortgage from J. F. Little to Cary, made in 1869, it is expressly recited that the

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deed from Smith was made by mistake to J. S. instead of Shadrach Little, and the same recital is contained in the deed made in 1879 by J. S. Little to Cary's vendee, and constitutes the only consideration therefor. Moreover, in the deed from J. F. Little to his two sons for the sixty acres in controversy, the reason appellants now give for making it is not stated at all, the only consideration expressed in it being love and affection.

Without the attempted explanation by appellants, the deed from J. F. Little to his two sons might be regarded simply as a conveyance without consideration, which, on its face, it appears to be, and thus fraudulent only as to creditors whose debts existed when it was executed. But this explanation is so palpably contradicted in every particular, and so unreasonable, as of itself to satisfactorily sustain the allegations contained in the several petitions of the plaintiffs, and to authorize the judgment of the lower court subjecting the land to the payment of their debts.

Judgment affirmed.

CASE 49—INDICTMENT—OCTOBER 31.

Sarrls v. Commonwealth.

APPEAL FROM HENRY CIRCUIT COURT.

1. EXCLUSIVE PRIVILEGE—SALE OF LIQUOR.—A statute which prohibits the sale of liquor within a certain territory, but provides that physicians may keep and prescribe it as a medicine, when necessary as such, does not confer an "exclusive privilege" within the meaning of the "Bill of Rights," and is not unconstitutional.

83	327
86	290
83	327
96	172
83	327
96	651

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2. FAILURE OF PHYSICIAN TO RECORD PRESCRIPTION OF LIQUOR.—

Where such a statute requires the physician to record every prescription of liquor in a book to be kept by him, and provides a penalty for his failure to do so, under an indictment against a physician for unlawfully selling liquor, the only question is, whether he in good faith prescribed the liquor as a medicine, when necessary as such; and, if so, he is not guilty, although he may have failed to record the prescription, that being a separate and distinct offense.

3. WHERE AN ACT OF THE LEGISLATURE PROHIBITS THE SALE OF LIQUOR in a particular locality, it is not essential to the validity of the act that the locality should be defined by the boundary of a city, town or civil district.**CARROLL AND BARBOUR AND WM. M. CRAVENS FOR APPELLANT.**

1. The statute under which the indictment was found is unconstitutional, because it confers an exclusive privilege upon physicians residing in the town of New Castle. (*Gordon v. Winchester Building Asso.*, 12 Bush.)
2. The indictment is bad because it charges three separate and distinct offenses, the charge being that the defendant "did sell, lend, and give spirituous, vinous and malt liquors."
3. The act under which the indictment was found creates two separate and distinct offenses, the unlawful selling of the liquor and the failure of the physician to record his prescription. It was, therefore, error in this case to require the jury to find, in order to acquit, that the defendant had recorded the prescription.

P. W. HARDIN, ATTORNEY-GENERAL, FOR APPELLEE.

1. Appellant can not be heard to complain of the unconstitutionality of a law that in nowise deprives him of his rights, but, on the contrary, makes him the exclusive beneficiary of the special privileges it confers. (*Cooley's Const. Lim.*, 164; *Marshall v. Donovan*, 10 Bush, 691; *Thompson v. Carr*, 13 Bush, 216.)
2. The recording of the prescription is a condition precedent to the physician's right to sell.
3. The indictment charges but a single offense.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The offense charged in the indictment in this case is unlawfully selling and giving to another person spirituous, vinous, and malt liquors without license.

within the corporate limits of the town of New Castle, said liquors, as charged, not being necessary to the person to whom they were alleged to have been sold and given as medicine, nor prescribed by a physician for that purpose.

The indictment was found under an act of the General Assembly, entitled "An act to prohibit the selling, lending, or giving of spirituous, vinous or malt liquors to any person or persons within the corporate limits of the town of New Castle, in Henry county, Kentucky, and within the distance of three miles of the court-house in said town," approved April 8, 1882.

By section 1 of the act it is provided, "that it shall be unlawful for any person or persons to sell, lend or give to any other person or persons spirituous, vinous or malt liquors, in any quantity whatever, within the corporate limits of the town of New Castle, or within the limits of three miles of the court-house of said town, except as herein provided." And by the same section the penalty for each violation is a fine of sixty dollars.

Section 3 provides that spirituous, vinous or malt liquors may be kept and prescribed as a medicine, when necessary as such, but for no other purpose, by a physician or physicians within the limits mentioned; but such physician or physicians shall record, in a book or books to be kept by him or them for said purpose, every prescription so made, with the date, quantity prescribed, and the name of the person prescribed for, etc. And the failure to,

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do so is made a misdemeanor, punishable by a fine of sixty dollars.

The first ground relied on for reversal of the judgment of conviction that we will notice is, that the act is unconstitutional, because, as counsel contend, it confers upon physicians residing within three miles of the court-house in New Castle special privileges to the exclusion of all others, whether they be physicians or not.

We do not think section 3 of the act can be fairly construed to confine the privilege of keeping and prescribing liquors as medicine, when necessary as such, to physicians residing within the limits mentioned, if it be a privilege in the meaning of the Bill of Rights, or to make it a misdemeanor for one residing without such limits to do so.

The act by its terms is operative, and a violation of its provisions can be committed only within a prescribed boundary. But, in our opinion, the immunity conferred upon physicians is no more restricted to those of that profession who actually reside there, than the penalties imposed are restricted to resident violators of the act.

It is unquestionably true, that, by the terms of the act, it is made unlawful for any person, besides a physician, to sell, lend, or give to any other person spirituous, vinous or malt liquors, in any quantity whatever, within the boundary mentioned, except that a parent may give liquor to his child, or guardian to his ward, and, therefore, the necessary effect of the act, standing alone, stating the proposition in the strongest language, is, that physicians

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may exercise a privilege or right denied to all others, except a parent or guardian, and enjoy immunity from what, if done by others, is a misdemeanor.

The social order, health and security of a local community may, in the opinion of the Legislature, require that the selling or giving of spirituous, malt or vinous liquors, to be used as a beverage, be prohibited, as to which, as well as any other subject affecting the health or morals of a community, that department of the government has the power to determine; and it is not inconsistent with that object to authorize the sale of liquors as medicine when necessary for that purpose; on the contrary, while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as medicine.

But it is no exercise of arbitrary power, nor the grant of an exclusive privilege to any man or set of men, in the sense the term is used in the Bill of Rights, to restrict the right of prescribing liquors purely as medicine to a profession peculiarly fitted to determine when it should be so used, and of which any person who may qualify himself has the constitutional right to become a member.

In the case of *Anderson v. Commonwealth*, 13 Bush, 485, referred to by counsel, where the validity of what is called the "local option law" was considered, this court, though divided in respect to the constitutionality of some of the provisions of that statute, used this language: "We unanimously hold

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that the sale by retail of intoxicating liquors may be constitutionally regulated; and that in localities, where, in the opinion of the Legislature or of its constitutionally organized agencies, the peace and good order of society so require, license to carry on the retail traffic may be refused altogether."

The act under consideration, it is true, does not operate in a locality defined by the boundary of a city, town or civil district; nor do we deem it essential to its validity that it should, especially as it was made to take effect from its passage, without submission to the voters affected by it.

It will be perceived, by reference to the case of *Anderson v. Commonwealth*, that one of the grounds upon which the two judges holding the local option act invalid based their objection was, that the seventh section made the guilt or innocence of a physician who prescribes liquors to his patients depend on the vote of the people. By that act physicians, it is true, are not permitted to sell liquors, but the exclusive right is given to druggists to sell for medicinal purposes, on a prescription made and signed by a regular practicing physician; yet no member of the court objected to the act upon the ground that an exclusive privilege was thereby granted to druggists or physicians.

If the Legislature has the power at all to prohibit the sale of intoxicating liquors by retail, it exists alone because the health, peace and order of society require it; and upon that ground alone this court, without dissent, has heretofore decided it may be exercised; but there being no reason therefor, the

power of the Legislature to prohibit the prescription and sale of liquors to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious purposes.

In our opinion, therefore, section 3 of the act in question, instead of granting an exclusive privilege, as the word is used in the Bill of Rights, is merely exceptional, and so far from being violative, is, in fact, conservative of the constitutional rights of the people.

But we think the lower court erred in giving and refusing instructions.

The court, at the instance of the Commonwealth, gave an instruction, and also gave the converse of it on its own motion; but as there is little difference in the legal bearing of the two, both being improper, we will quote only the latter, which is as follows:

“If the jury believe from the evidence that the defendant was, at the time of letting Stewart have the whisky, a practicing physician within the limits of the town of New Castle, and in good faith prescribed the whisky to said Stewart as a medicine, and then recorded the same in a book kept for that purpose, giving the name of the person, time and quantity prescribed, they must find for the defendant.”

Counsel for the defendant then asked for the following instruction, which was refused:

“If the jury believe from the evidence that the defendant was, at the time of letting Stewart have the whisky, a practicing physician within the limits

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of the town of New Castle, and in good faith prescribed the whisky to said Stewart as a medicine, they must find for the defendant."

By section 3 of the act it is required of a physician who keeps and prescribes liquors as a medicine, to record, in a book kept by him for the purpose, every prescription so made and given, with the date, etc.; but his failure to do so is made a distinct offense, of which he may be convicted and fined the same amount that is prescribed for selling when the liquor is not to be used as medicine. He is indicted in this case for unlawfully selling, lending and giving liquors, not for the offense of failing to record, in a book kept by him, the prescriptions made and given.

Evidently the object of the Legislature in requiring the prescriptions recorded was to guard against the sale of liquor by physicians to be used as a beverage and not as medicine; and whether the defendant in this case in good faith prescribed the liquor sold to Stewart as a medicine when necessary as such, was the only question for the jury to determine, and if he did so, then he was not guilty, although he failed to record such prescription in a book kept for the purpose.

The mischief the Legislature intended to guard against is the sale by physicians of liquor in bad faith, not to be used as medicine; and whenever it appears from the record kept by the physician, which may or not be conclusive, or is proved otherwise, that he has in good faith prescribed and sold or given liquors as a medicine, his defense is made out. For it may be that a physician is able to ex-

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hibit a book in which the prescription is recorded in a given case, though he has sold the liquor to be used merely as a beverage; while, on the other hand, he may in good faith prescribe and sell or give liquor as medicine, and still be liable to the penalty for failing to record the prescription. The practical effect of the instruction given is to require the defendant to exculpate himself from an offense not charged in the indictment.

The instruction asked by the defendant and refused embodies the law and presents the sole issue, and should have been given.

Judgment reversed for a new trial and further proceedings according to this opinion.

CASE 50—PETITIONS EQUITY—OCTOBER 31.

Martin, &c., v. Kennedy, &c.
Nesbitt, Assignee, &c., v. Same.
Clarkson, &c., v. Same.

APPEALS FROM KENTON CIRCUIT COURT.

1. PARTITION—PENDENTE LITE PURCHASERS.—In an action instituted for that purpose, land was partitioned and deeds made to the several persons entitled to an interest in the land. One of the persons to whom land was allotted mortgaged two distinct parcels of the portion allotted to him, and attachments were levied by his creditors upon other specified portions. Subsequently, upon appeal, the partition made was set aside, and another partition made. In the last partition the lots mortgaged and levied upon were allotted to other parties in interest.

Martin, &c., v. Kennedy, &c. Nesbitt, Assignee, &c., v. Same.

Held—That the mortgagees and attaching creditors must be treated as *pendente lite* purchasers, and all the property of the debtor having passed to his assignee for the benefit of creditors, the liens of the mortgagees and attaching creditors can not be shifted to lots assigned to the debtor in the last partition.

2. ATTORNEYS' LIENS.—Where a statutory lien is attempted to be asserted by an attorney, to the prejudice of other creditors, the facts must appear as to the nature and extent of the recovery by the attorney for his client. The mere fact that a commissioner, in making deeds of partition, has inserted a lien in favor of attorneys, will not give them a lien, the authority of the commissioner to insert the lien not appearing.
3. FRAUDULENT CONVEYANCES.—Conveyances by a debtor to his near relations, in rapid succession, are held to be fraudulent under the circumstances of this case.

SIMMONS AND SCHMIDT FOR APPELLANTS MARY AND KATE MARTIN.

1. It was error to set aside the conveyance from P. F. Martin to Mary Martin, or the mortgage to Kate Martin, in the absence of any pleading asking that it be done. (Civil Code, section 90.)
2. Property which has been fraudulently conveyed can not be levied on and sold under attachment as that of the debtor. The conveyance must first be directly and successfully attacked.
3. The uncontradicted testimony of the grantor as to the consideration paid by the grantee must be taken as conclusive. (Cecil v. Sowards, 10 Bush, 95.)
4. The mortgage to the bank can not be shifted to the parcels of land allotted to the mortgagor in the second division.
5. The statute does not give attorneys a lien upon land for services rendered by them in successfully defending an action for its recovery. (Wilson, &c., v. House, &c., 10 Bush, 406; Egenton, &c., v. Rusk, &c., MS. Op.)

F. P. MARTIN FOR APPELLANTS.

1. Where, in partition, a parcel of the estate which is covered by a mortgage executed by one co-tenant, or by attachment liens, falls to a tenant, other than the mortgagor or attachment debtor, the liens are wholly lost, and can not be "shifted" to the parcel or parcels allotted to the debtor; and this rule applies in this case, the liens having been acquired *pendente lite*. (Bartlett v. Harlow, 12 Mass., 348; Marshall v. Turnbull, 28 Conn., 185; Mitchell v. Hazen, 4 Conn., 509; Porter v. Hill, 9 Mass., 35; Dora v. Dunham, 24 Tex., 377; Prim v. Walker, 38 Mo., 98; 5 Conn., 365; 2 Conn., 244; 9 Vt., 140; 17 Conn., 392; 19 N. J. Eq., 401; 3 Stock., 548; 21 Pick., 284; 24 Pick., 333; 28 Tex., 51; 10 Gray,

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82; 10 N. H., 246; 15 N. H., 449; 24 Me., 485; 12 Me., 200; 12 Cush., 898; 1 Har. & J., 100; 48 Miss., 384; 1 Washburn on Real Property, 817 (side page); Green vs. Arnold, 11 R. I., 864; Var-num v. Abbott, 12 Mass., 478; Souther v. Porter, 27 Me., 417; Marks v. Sewall, 120 Mass., 174.)

2. The statute gives attorneys a lien only upon "property recovered," not upon property the title to which they have merely defended against attacks made upon it.

HALLAM & MYERS FOR APPELLANTS CLARKSON, &c.

Where a conveyance is attacked by a creditor of the grantor upon the ground that it is fraudulent and without consideration, the burden is on him to establish these facts. (*Evans v. Stone*, 8 Ky. Law Rep., 752; *Bouvier's Law Dictionary*, titles "Burden of Proof" and "Fraud;" *Bank United States v. Huth*, 4 B. M., 442; *Jenkins v. Jenkins*, 8 Mon., 828; *Hardin v. Baird*, Litt. Sel. Cases, 845.)

A. C. ELLIS AND J. E. HAMILTON FOR APPELLEES.

1. The several conveyances from F. P. Martin to the different members of his family are fraudulent and void as to creditors.
2. Equity requires that the attachment liens upon the lots, which in the second division were allotted to others than the debtor, be transferred to those lots which were allotted to him.
3. The statute gives attorneys a lien only upon land *recovered*, and not upon land which they have succeeded in preventing another from recovering from the client.

J. F. & C. H. FISK FOR APPELLEE FIRST NATIONAL BANK.

1. The conveyances from F. P. Martin to the different members of his family are fraudulent.
2. The lien of the bank under its mortgage, and also the liens of the attaching creditors, should be transferred to the parcels allotted to the mortgagor in the second division. The lien follows the interest, and remains upon it whenever and wherever located. (1 *Story's Equity*, sections 656b and 656c; *Freeman on Co-tenancy and Partition*, sections 102, 415, 470, 478, 479, 505 and 549; 1 *Hilliard on Mortgages*, page 16, par. 23, and page 18, par. 26; *Green v. Arnold*, 11 R. I., 864; *Randell v. Mallett*, 14 Me., 51; *Lessee of White v. Sayre*, 2 *Hammond (Ohio)*, 110; *Davis' Lessee v. Whitesides, &c.*, 1 *Bibb*, 510.)

CHAS. H. FISK AND CHAS. S. FURBER FOR APPELLEE J. F. FISK.

1. The services of J. F. Fisk were rendered in a former action in which his claim was allowed, and a lien given him therefor. That judgment can not be revised in this case.

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

These several actions, five in number and consolidated, were instituted at law, and attachments obtained that were levied on the real estate of Freeman P. Martin, the debtor. The action was transferred to equity, and during its progress claims were set up to certain portions of the real estate levied on by the attachments by the wife of Freeman P. Martin, Mary A. Martin, the mother, and by the two Clarksons, who were the brothers-in-law, and deeds exhibited by each claimant purporting to pass the absolute title.

In July, 1876, the debtor conveyed to his brothers-in-law the real estate claimed by them in consideration, as recited, of the sum of thirty-five hundred dollars in hand paid. In November, 1876, he conveyed certain other real estate to his mother, Mary Martin, and in October, 1876, he conveyed to his wife, Kate Martin, all his interest in this estate of his grandfather, as claimed by him from that source, to indemnify her for any moneys she might have to pay for him, and for the payment of which she had pledged her own estate. Not long after this the debtor, F. P. Martin, became a bankrupt, and one branch of this controversy is between the claimants of the estate by their respective deeds and the creditors of F. P. Martin.

These deeds are attacked as fraudulent and void, being without any consideration. The transactions between the debtor and his near relations, by which he divested himself of title by deeds in such rapid succession, would indicate the necessity felt by the

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debtor of placing his property beyond the reach of creditors.

His wife had but little, if any estate. His brothers-in-law were in the same condition, and the conveyance to the mother was evidently based upon a mere ideal claim, and these relations were but the instruments by which the debtor was seeking to avoid the payment of his debts.

If the deeds were without any consideration they were fraudulent as to these creditors, and the facts of this record show clearly that all these claimants were holding for the debtor, and that not only constructive but actual fraud existed. It is useless to analyze the testimony or to discuss its effect upon any one of the deeds, as it plainly appears that they were made for the protection of the debtor, so as between the appellants and the creditors the property levied upon should be subjected to the payment of Freeman P. Martin's debts.

Freeman P. Martin became a bankrupt, and the appellant, B. Nesbitt, was made the assignee, and the principal question in this case arises as between the assignee's claim to this property in behalf of creditors on the one side, and certain attaching and lien creditors on the other.

Freeman P. Martin owned an undivided interest in the estate of one O. R. Powell. This estate was composed of many parcels of real estate in the city of Covington.

In an action instituted in the court below, under the style of *Stevenson v. Martin*, a partition was made of this landed estate under the direction of

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the Chancellor, and deeds made to the several tenants in common, or to those entitled to an interest in the land.

A conveyance was made to Freeman P. Martin of his interests, and when this was done he executed to his mother, to his wife, and to his brothers-in-law deeds for several of the lots, which have been already held in this opinion to have been void as to creditors. He also executed to the National Bank of Covington a mortgage upon two distinct parcels of this land allotted to him, and attachments in behalf of the creditors, who are the appellees here, were levied on certain other specified portions of the property, as appears from the return on the attachments. The litigation resulting in a partition of this real estate was brought to this court, and the judgment below was reversed, by which the partition made under the judgment appealed from was set aside and another partition of the realty made. The bank and the attaching creditors were not parties to that action, and took or held the property upon which the liens were created subject to any final judgment that might be rendered in the action where partition was sought. They must all be treated as *pendente lite* purchasers.

The title to all the estate of Martin passed to his assignee for creditors, and this assignee is in this case, by his pleading, asking that their rights be protected.

When the last partition was made, one of the lots mortgaged to the bank, and the lots attached by certain creditors, were assigned to other parties in

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interest, and it is now claimed by the bank and the attaching creditors that their liens acquired by their attachments and the mortgage on the lots that were assigned to others, should be shifted on to other lots or parcels of ground assigned to Martin in the last partition. It is not insisted that they have any legal liens on any property but that upon which the liens originally existed; but these liens having been lost by the adjudication between the original owners, it is urged that a court of equity should give them some relief.

These appellees sought to enforce their rights *pendente lite*, and having levied their attachments, and acquired their liens on *specific lots* or parcels of ground allotted to the debtor, it is difficult to create for them such an equity as would enable the Chancellor to transfer liens upon one specific parcel to another, upon which there is no claim that any lien ever attached.

A levy or a mortgage upon the undivided interest of the debtors in the entire realty would determine at once the rights of the creditors; or if the mortgage had been executed on a particular parcel of this realty, to which the debtor had no title under the first partition, but which had been assigned him in the last partition, the title having been vested in the debtor would have inured to the benefit of the mortgagee.

In this case, in making the allotment, many distinct parcels of land were given to each joint owner, with the boundary specifically defined. On certain of these lots liens were attempted to be created. The

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liens were lost, or the property adjudged to belong to some one else, and for that reason a court of equity is asked to enlarge the liens by placing them upon other realty, so as to indemnify the creditor for the loss sustained.

It can not be said that the attaching creditor or the mortgagee, by acquiring this lien, became invested with the interest of the debtor to that extent in the real estate owned by him, particularly when he was not a party to the litigation in which the title was determined asserting his right to participate in a future allotment. Besides, these are liens purely legal, and confined to specific property that, if not belonging to the debtor, affords the creditor no security. The rights of others have intervened, who, as creditors of the insolvent debtor, are entitled to share in the distribution of his assets, and the Chancellor would not seek an equity in behalf of these appellees for no other reason than that they may occupy the position of preferred creditors.

In *Green v. Arnold*, 23 American Reports, 466 [11 R. I., 364], where there was a suit for partition, the common estate, consisting of sixteen parcels, upon some of which liens existed by mortgage, the Chancellor held that the decree could not extend any mortgage to property not included or described by the mortgage. "We can no more," says the court in that case, "extend the mortgages over land not covered by them than we could so many absolute conveyances."

In *Randell v. Mallett*, 14 Maine, 51, the mortgage was on so many acres of an undivided tract that

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made the purchaser, if absolute, a tenant in common, and at least gave to the mortgagee an interest to that extent undivided. Here there are numerous parcels allotted to each tenant in common, and when levied on or mortgages executed on a particular lot described by metes and bounds, it must be treated as a distinct estate. We perceive no remedy in such a case by a purchaser of the absolute estate in a specified lot except upon his warranty, or if a party to the subsequent division, he might ask the Chancellor to assign the particular lot purchased by him to his vendor, in the event his vendor refused to protect him. Here the estate has gone to the assignee for creditors, with no lien existing, and we know of no rule of law or equity authorizing the Chancellor to transfer the lien from one distinct parcel of land to another, upon which there is no pretense a lien ever existed.

It is maintained in argument that there are no creditors of the bankrupt but those now before the court. This fact the court below could not assume, and if there were no other creditors but those parties to this proceeding, McKee, Finnell, Handy, etc. are in court as creditors, resisting the superior equities asserted by the appellees; so we have both the assignee for creditors, and the creditors, or some of them, in court raising the question here presented. It will be conceded that if the equities on the part of the appellees existed, the assignment in bankruptcy could not change their relation to the debtor or to his estate; but it is manifest that their legal rights can not be converted into equities, so as to

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give to the appellees a prior lien upon other estate of the debtor than that to which the original lien attached.

This brings us to the consideration of the last question raised by the assignment of errors. The assignee (appellant) of Martin, as well as some of the creditors, are contesting the liens of the attorneys who were employed by the debtor, or if not by him, under an employment from some one else, asserted against the property in controversy. The record does not show the authority of the commissioner when making these deeds to insert liens in behalf of any attorney; and while in a proper state of case a lien for a reasonable fee will be retained, we perceive nothing in this record to justify the Chancellor in allowing \$2,000 to one attorney, \$1,500 to another, \$1,250 to another, and \$1,000 to another, to be paid out of the estate of Freeman P. Martin.

Contracts between clients and attorneys will, of course, be enforced, and where there are no exceptions to the allowance this court can not interpose; but here liens are attempted to be asserted to the prejudice of other creditors, and we see no such state of case as is now presented that will authorize the Chancellor to say that these liens exist. The facts must appear as to the nature and extent of the recovery by the attorney for his client before a lien is created. What property, real or personal, has he recovered? The Chancellor should be enlightened in regard to these matters before allowing these liens to be enforced.

The judgment in this case is affirmed on the appeal

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of F. P. Martin and wife, on the appeal of Clarkson, and reversed on the appeal of the assignee, Benj. Nesbitt, and others, and cause remanded for proceedings consistent with this opinion.

CASE 51—PROBATE OF WILL—NOVEMBER 5.

Fuller v. Fuller.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. **WILLS—CREDIBLE WITNESSES.**—The requirement of the statute that a will shall be attested by "at least two credible witnesses," means that it shall be attested by such persons as are not disqualified by mental imbecility, interest or crime, from giving testimony in a court of justice. It was, therefore, error in this case to require the jury to find that the witnesses to the will in contest were credible persons, in order to sustain the will; but as there was no testimony even tending to show that the witnesses to the will were not credible, the instruction was not prejudicial.
2. **EVIDENCE—PREJUDICIAL ERROR.**—The refusal of the court to permit the propounder of a will to testify in chief after the contestant had introduced his testimony, and after she had introduced other testimony in her behalf, even if error, does not appear to have been prejudicial, as there was no avowal of what she would state if introduced in chief, and nothing to show that she did not, in fact, testify all she knew.
3. **AN INSTRUCTION** calling attention to the isolated fact that, by the paper in contest the maker had disinherited his son, was properly refused.
4. **EVIDENCE.—LETTERS** from the testator to his son, the contestant, were competent to show the affectionate relation existing between them, and the purposes of the testator with regard to the disposition of his property.
5. **HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS.**—Letters from the testator to his wife, the propounder, were not incompetent, as evidence for the latter upon the ground that they were "confidential communications."

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C. J. HELM AND O'HARA & BRYAN FOR APPELLANT.

1. Whether the testator had capacity to "take charge of a large business" was not the test of the testator's testamentary capacity, and it was misleading to allow the question to be asked.
2. The letters from the testator to his son were incompetent as evidence in the absence of the other part of the correspondence.
3. It was error not to allow the propounder of the will to testify in chief. Subsection 4 of section 606 of the Civil Code does not apply to the special proceeding of probating a will. (*Milton et al. v. Hunter*, 13 Bush, 171; *Flood v. Pragoff*, 79 Ky., 612.)
4. The letters from the testator to his wife were competent evidence for the latter. The inhibition of the Code is not against communications between husband and wife being given in testimony, but against either husband or wife testifying in regard thereto. (Civil Code, section 606, subsection 1; *Goddard v. Gardner*, 28 Conn., 172; 2 Stark. Ev., 230; 1 Greenl. on Ev., section 239; 1 Phil. Ev., 162; *Gainsford v. Grammar*, 2 Camp., 9; *Jackson v. French*, 3 Wend., 337; *Hatton v. Robinson*, 14 Pick., 416; *Hoy v. Morris*, 13 Gray, 519; *State v. Center et al.*, 35 Vt., 378; *Smith v. Griffin*, 110 Mass., 181; *The State v. Buffington*, 20 Kansas, 599.)
5. It was error to require the propounder to prove that the attesting witnesses were "credible persons;" their credibility is presumed.

O. W. ROOT AND A. T. ROOT FOR APPELLEE.

1. Errors not specified in the grounds for a new trial will be treated as waived. (*Slater and Wife v. Sherman*, 5 Bush, 206; *Hopkins v. Commonwealth*, 8 Bush, 480; *L. C. & L. R. R. Co. v. Mahoney's Adm'r*, 7 Bush, 237.)
2. The entire exclusion by the testator of his only child is a fact entitled to great weight upon the questions of testamentary capacity and undue influence. (*Kevil, &c., v. Kevil, &c.*, 2 Bush, 614.)
3. The court properly refused to allow the propounder to testify in chief after introducing other testimony in her behalf, and after the testimony for the contestant was closed. (Civil Code, section 606.) But if the court erred, the error was not prejudicial, as she was only nominally prohibited from testifying in chief.
4. The letters from the testator to his son were competent as a part of the *res gestæ*; they showed the testator's feeling toward his son, and his purposes with regard to his property. (1 Greenleaf on Ev., section 108.)
5. As to the law of sound and disposing mind and memory, and of improper or undue influence in its application to testators in the execution of wills, and the legal definition of those phrases. (*Tudor v. Tudor*, 17 B. M., 395; *Wier's Will Case*, 9 Dana, 440; *Overton's Heirs v. Overton's Ex'rs*, 18 B. M., 63; *Quisenberry v. Quisenberry*,

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14 B. M., 482; Ashley Howard's Will, 5 Mon., 199; Reed's Will, 2 B. M., 79; McDaniel's Will, 2 J. J. Mar., 881; Elliott's Will, 2 J. J. Mar., 840; Watson v. Watson, 2 B. M., 74; Harrell v. Harrell, 1 Duv., 204; Jones v. Jones, 14 B. M., 474; Maupin v. Wools, 1 Duv., 228; Turley's Ex'r v. Johnson, &c., 1 Bush, 116.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

Wm. F. Fuller died on the 27th day of February, 1881, leaving the appellant, Jane Fuller, as his widow, and the appellee, Thomas S. Fuller, whose mother was a former wife, as his only child. On January 12, 1881, and during his last illness, he executed a paper in due form, purporting to be his will, and under which his widow would take his entire estate of about fifteen thousand dollars. The Campbell County Court, after hearing the testimony, probated it. The appellee, Thomas S. Fuller, appealed from its judgment, and upon a trial before a jury in the Campbell Circuit Court, it was rejected. The attack upon it is based upon the alleged testamentary incapacity of Wm. F. Fuller, as well as the claim that it was procured by undue influence.

It is unnecessary to review the testimony in the case, and sufficient to say that it is quite conflicting. Under the existing law, the verdict of a jury in a will case is entitled to the same effect as a verdict in any other civil case, and unless palpably against the testimony, it will not be disturbed. Such a state of case is not exhibited by the record, and it only remains for us to determine whether the lower court has committed any error as to the law of the case, by which the appellant's substantial rights have been prejudiced.

The propounder proved the due execution of the

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paper, and then rested. The contestant then offered his testimony, and the appellant, Jane Fuller, then offered to testify *in chief*. This was refused by the court, and she then testified at length in rebuttal. It is not necessary to decide whether the evidence, which the propounder of a will offers after the contestant has introduced his testimony, is to be regarded as merely *contra*, or as in chief; nor whether, after introducing other testimony in his behalf to prove due execution of the paper as a will, he can, in a proceeding of this character, testify for himself in chief, under subsection 4 of section 606 of the Civil Code, which provides: "No person shall testify for himself in chief, in an ordinary action, after introducing other testimony for himself in chief." This question is not now presented, and hence it would not be proper to decide whether said section is applicable to a special proceeding of this character. There was no avowal of what the appellant would state if introduced in chief, nor does it appear that she did not, in fact, testify all that she knew.

In fact a portion of her testimony was not in rebuttal, but in chief; so that it seems she was only *nominally* prohibited from testifying in chief, and when she did testify, there was no offer to prove any thing by her further than what was stated by her, or any avowal or any showing in any way that she could have testified to anything else.

The instruction asked by the appellant was properly refused, as it singled out and attempted to instruct the jury upon the isolated fact that by the paper in contest the maker had disinherited his

son; nor is the second instruction that was given by the court liable to the objection that it assumes that flattery or threats will necessarily create undue influence.

The first instruction that was given to the jury required them to believe from the testimony that the witnesses to the will were *credible* persons. This was not proper. It is true that section 5 of chapter 113 of the General Statutes requires that a will, if not wholly written by the testator, to be valid, must be acknowledged by him in the presence of and attested in his presence by "at least two *credible* witnesses." The statute of 1797 (2 M. & B., page 1537) used the word "*competent*;" and this seems to have been the language of the law until the adoption of the Revised Statutes in 1852, when the word "*competent*" was changed to the word "*credible*."

Prior to the change, however, the word "*credible*" had been construed in similar statutes, in both England and many of the States of this country, to mean "*competent*."

The English statute as to the execution of wills prior to 1838 used the word, "*credible*;" and in 1 Jarman on Wills, page 124, it is said, in speaking of it:

"The statute, it will be observed, required the witnesses to be 'credible,' and which was held to mean such persons as were not disqualified by mental imbecility, interest or crime from giving testimony in a court of justice."

This rule has been followed by the decisions of

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the courts in the States of Massachusetts, Connecticut, Mississippi, South Carolina, and several others where a similar statute existed. (Hawes v. Humphrey, 9 Pick., 350; Cornwell v. Isham, 1 Day, 35; Taylor v. Taylor, 1 Rich., 531; Rucker v. Lambdin, 12 S. & M., 230.)

We conclude that the law-making power had this construction and meaning in view when the word "credible" was introduced into the statute. No other construction of it is reasonable or free from absurdity.

Suppose a court or a jury have no doubt but what the testator in fact executed the paper, and that the attesting witnesses have testified truthfully; but yet it be shown that they are not credible persons. Is the will to be rejected?

Or suppose that the witnesses to a will were credible when it was executed; but when it is offered for probate, years after the execution of it, have become of bad character; now, assuming that the word "credible" does not relate to the date of attestation, is the will, therefore, to be rejected?

Or suppose the witnesses deliberately testify that they did not witness it, when, in fact, they did, but are of such bad character that they do not scruple at perjury—would not the propounder be allowed to prove their want of credibility, and that they, in fact, did attest it, and have it probated? It seems to us that further illustration is unnecessary.

In this case, however, there is nothing even tending to show that the witnesses to the will were not credible. No attack, either direct or indirect, was

made upon them; and it is evident from the entire record that the appellant was not prejudiced by the portion of the instruction which we have just reviewed.

The letters from Wm. F. Fuller to his son were competent testimony for the latter, because they not only showed the affectionate relation existing between them, but also stated what the former intended to do with his property.

There are several other alleged errors assigned; but, in our opinion, they are either not in fact such, or, if so, they were not of a character to prejudice the substantial rights of the appellant. For instance, it was competent for the appellee to ask the appellant's witness whether the deceased was mentally and physically competent to "take charge of a large business" in order to see to what extent the witness would go. It was immaterial, however, how the appellee was received by the appellant when he attended his father's funeral, and the court properly refused to let the witness Hodge answer the question: "State some persons whom you consider hard drinkers, and the effect upon them?" Nor do we think that the appellant could have been substantially prejudiced by the testimony relating to the deceased visiting the Fallis family, or the appellee's statement that when he lived at his father's, before his majority, his step-mother's treatment of him "was no more than a persecution; she always tried to provoke me to do something ill-natured;" or by the rejection of the letters offered by the appellant from the appellee to his wife, and from

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the latter to her husband, and from Wm. F. Fuller to his wife, the appellant. We do not think the latter were incompetent upon the score of "*confidential communications*;" but none of them were material, save the one dated August 4, 1880. It is true that it states that the wife had never said anything to him as to his son, but it also uses language not fatherly, and of a violent character as to the son, while the record discloses that soon after that time he was writing to him in the most endearing terms, and it seems to us that the letter would have been more prejudicial than beneficial to the appellant. In any event, upon a view of the entire record, it is apparent that its rejection did not prejudice her substantial rights.

Judgment affirmed.

CASE 52—PETITION EQUITY—NOVEMBER 12.

Ryan, &c., v. Morrill & Co.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. THE RECEIVER OF A FUND, HAVING LOANED IT TO A FIRM OF WHICH HE WAS A MEMBER, a repayment by the firm to him will not exonerate the other members of the firm, he having subsequently converted the funds to his own use. He will not be allowed to hold the fund in one hand as a member of the firm, and in the other as receiver of the court. Each member of the firm should be regarded as holding the money in trust, to be discharged by again placing it under the control of the court, that it may be distributed to those entitled to receive it.
2. POWER OF RECEIVER TO LOAN MONEY.—In this case the receiver had no authority, express or implied, to loan the money; but if

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he had been invested with such a general power, it would have been a violation of the trust for him to loan the money to himself or to a firm of which he was a member.

GOODLOE AND ROBERTS AND JAMES S. PIRTLE FOR APPELLANTS.

1. When a man occupies the dual position that Morrill did, he can not make a payment without separating the money from his own. Therefore, the fund which was misappropriated by J. W. Morrill & Co. has, to the extent of \$8,900, never been replaced.
2. So soon as the firm of J. W. Morrill & Co. knew of the breach of trust by Morrill, the receiver, they became indebted to the *cestui que trust*, and this debt could only be discharged by actually bringing the money into court, and putting it into the actual custody of the court, or by paying it to the *cestui que trust*. (Collyer on Partnership, section 456; *Ex parte* Watson, 2 Vesey & Beames, 414; Smith v. Jameson, 5 Tenn. Rep., 601; Hutchison v. Smith, 7 Paige, 26; Perry on Trusts, section 808.)
3. A receiver has no power other than the power granted by the court, and all persons dealing with him must see to it that the orders of the court authorize such dealing. (Kerr on Receivers, page 207; *Ibid.*, note 1 to chapter 11, page 196.)

GEO. B. EASTIN FOR APPELLEES.

1. If a partner, in the course of a transaction *outside of the business of the firm* obtains money and misapplies it, the firm is not then liable to make good the loss; and a fraud committed by a partner while acting *on his own separate account* is not imputable to the firm, nor can the firm be charged with any of its consequences. (Lindley on Partnership, volume 1, page 302, 4th ed.)
2. There was a complete separation of the money paid over to Morrill in settlement of his receiver's account, and a complete transmission of the fund from one to another.
3. It is established by the cases cited for appellants that a party borrowing trust money wrongfully *may* be treated as the debtor of the *cestui que trust*, at any time before he has actually repaid the money to the trustee, and may be required to pay it directly to the beneficiary, if the latter should so elect; but no case can be found which recognizes any liability on the part of the borrower *after the money has been paid back, in good faith and without notice*, to the trustee from whom it was borrowed. (Collyer on Partnership, section 571; Perry on Trusts, section 808; Sheridan v. Joyce, 7 Irish Eq. Rep., 118; Landon v. Weston, Jurist, N. S., volume 2, page 58; Hutchison v. Smith, 7 Paige, 26; *Ex parte* Watson, 2 Vesey & Beames, 414; Smith v. Jameson, 5 Tenn. Rep., 601.)

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The mercantile firm of J. W. Morrill & Co., while engaged in business in the city of Louisville, was composed of W. W. Smith and J. W. Morrill. Smith resided in the city of New Orleans, and Morrill had the supervision and control of the firm in Louisville. The latter furnished or was to furnish, under the contract, but a small part of the capital, and acquired an interest in the net profits of the business when those profits should exceed "annually the sum of \$7,200."

The conduct of the firm's business was intrusted entirely to the control of J. W. Morrill.

In July, 1881, Morrill was appointed receiver by the Louisville Chancery Court in an action instituted for the purpose of settling a partnership under the style of J. H. Ryan & Co.

A large amount of money came into the hands of Morrill as receiver, to be distributed by him in that case as directed by the court, the greater part of which he accounted for; but when he made a settlement of his accounts it was ascertained that he had failed to account for \$5,200 of the money intrusted to his keeping.

When appointed receiver he was required by an order of court "to deposit all the money which comes to his hands as such in the Kentucky National Bank at Louisville, Kentucky, subject to his order as the receiver." This order was made at the instance of Morrill; and under a further order of the court he was required to sell and dispose of the stock of J. H. Ryan & Co., and if nec-

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essary to enable him to sell the stock on hand, he could replenish the old stock, etc.

It seems that after Morrill had been appointed receiver, and when the money of the firm of J. H. Ryan & Co. to a large amount had come to his hands, \$21,675 of this money found its way into the firm of J. W. Morrill & Co., and was used by Morrill for the purposes of that partnership, a fact, as the record demonstrates, well known to the appellee Smith, the co-partner of Morrill, the former then being in New Orleans. This sum of money, or the most of it, was drawn from the bank by Morrill, and used as a part of the capital stock of the firm of J. W. Morrill & Co., and an account opened on the books of that firm between J. W. Morrill, the receiver, and J. W. Morrill & Co.

J. W. Morrill checked out this money loaned the firm from time to time by checks payable to bearer, and sometimes to J. W. Morrill, until J. W. Morrill had withdrawn from the firm of J. W. Morrill & Co. the whole of the \$21,675.

All of this sum he paid out as receiver under the orders of the court in the case of J. H. Ryan & Co., except the sum of \$3,900, and this sum was misapplied by Morrill or converted by him to his own use.

- The appellees, William Watson, executor, and others entitled to this fund, instituted the present action against the firm of J. W. Morrill & Co. to recover the \$3,900 converted by Morrill.

It is insisted by the appellants that the firm of J. W. Morrill & Co. is liable for this money unaccounted

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for by J. W. Morrill, and the Chancellor below having adjudged against them, they have brought the case to this court.

The receiver, J. W. Morrill, was not authorized by an order of court or by virtue of his office to loan this money out, and in doing so was guilty of a breach of official duty; but having loaned the money out, a voluntary repayment to him, or its collection by him under the regular process of the law, under ordinary circumstances would again reinvest him with its control as receiver, and release the borrower from responsibility. Trustees are generally required to execute bond for the faithful discharge of their duties, and where there is no collusion or fraud between the borrower and the trustee, the former should not be held responsible for the trust property when he has repaid to the trustee the trust fund, although the trustee thereafter converts it to his own use.

A different result would seem to have been reached in a case cited or given by Mr. Perry in his work on Trusts. The case stated is: "If trustees suffer the trust property to pass to A by a breach of trust, and A afterwards passes the property back to the trustees, would the receipt of the trustees be a discharge of A, so that he could not be called on to account for the property if the trustees misapplied it? If the property comes back to the trustees in specie, so that it is exactly as if it had never passed out of their hands, it would seem that their grantee should not be further responsible; but if the property has been converted, and comes back in the form

of payment, it would seem that the receipt of the trustees would not indemnify the person who has knowingly dealt with the property by aiding in committing a breach of trust." (2 Perry on Trusts, section 808.)

In the case referred to as sustaining the text, it appears that, after the breach of the trust, the beneficiary notified the creditor not to pay the money to the trustee. This the creditor disregarded, and having paid the money, was held responsible. It may be, and no doubt is, a correct rule applicable to trusts, that when the trust property is converted by the trustee and a third person, in violation of the trust, that indemnity in money to the trustee or the beneficiary for the loss sustained by the party aiding in the conversion would not protect him if in a condition to produce the thing in kind. Such a question, however, is not presented in this case, and for that reason is not necessary to be determined.

The facts of this record render it entirely dissimilar to any of the cases relied on by either side. Here the receiver of the fund loans the money to a mercantile firm, of which he is a member, without an order of court, and in the absence of any authority, express or implied, to make the loan. Both partners, with a knowledge of the trust, use the money as capital stock in the firm business, and when unaccounted for, the only response is, that the money was repaid to one of the members of the firm, and by him converted to his own use; the one partner attempting to exempt himself from liability

by showing that the firm has accounted for the fund by paying the money to his co-partner.

It distinctly appears that Morrill, the receiver, loaned the money to himself and M. W. Smith, the two constituting the firm of J. W. Morrill & Co. The firm borrowing the money, or using it, each became bound for the debt, although creating the liability as partners, and upon this state of fact it is maintained that the payment of the money by the one obligor to the other releases the firm and the solvent obligor from all responsibility. That the firm of J. W. Morrill & Co. was liable for this trust fund when loaned to the firm will not be questioned; if so, how can a payment by the firm to one of its members, who applies the money to his own use, relieve the firm from responsibility?

It would have been in violation of the trust, where the general power to loan the money was authorized, for the trustee to loan it to himself, or to a firm of which he was a member, and when making such a loan, the dual relation that he occupies as receiver and borrower will not protect the firm from liability, although it may clearly appear that the money has been repaid by the firm to him. He will not be allowed to hold the fund in the one hand as a member of the firm, and in the other as receiver of the court.

"If the trustee is a member of a firm, and the trust fund is invested in the business of the partnership, the firm must account." (Perry on Trusts, volume 2, section 46, 3d edition.)

"Nor can trustees loan money to a partnership

of which they are members." (Perry on Trusts, volume 1, page 573, 3d edition.)

It may be argued, which is undoubtedly the case, that this principle laid down in the text-books arises where the question made is, whether the liability is on the firm or with the individual partner who makes the loan.

So the question here is, must the *cestui que trust* look to the firm who borrowed and used the money, or to the recusant trustee who, being a member of the firm, has had the money repaid him, and failed to account for it to those entitled.

The facts show a borrowing by the firm of the trustee, the latter becoming bound as one of the firm for the money, and when the trust fund is lost, the one equally bound with the other has been released by the judgment below, because of the application by one of the partners of the money to his own use. In other words, the payment by the one partner to the other destroys the partnership liability.

The firm had voluntarily assumed to control the trust fund, and placed themselves in a condition where there was no escape from liability, if either the firm or one of its members failed to account. They were jointly and severally liable for this money, and should be treated with reference to the production of the fund as if the money had been loaned the firm under an order of the court. When using the money for the purposes of the partnership, the firm and each member of the firm should be regarded as holding the money in trust,

Ryan, &c., v. Morrill & Co.

to be discharged by again placing it under the control of the court, that it may be distributed to those entitled to receive it.

Those who undertake to speculate or trade with trust funds in conjunction with the trustee, and with a knowledge of the trust, should, to the extent of the funds used, be held to the same responsibility as the trustee, and will be required to see that the fund used is paid over by the recusant trustee that it may be applied to the purposes of the trust. To relieve the appellee or the firm from responsibility in such a case as this, would be to invite faithless trustees to engage in business or speculation with others upon the credit of the trust property, making it bear the burden of the loss, if any, while the profits, if made, are enjoyed by the intermeddler to the exclusion of the beneficiaries, unless by the skill of a detective it is ascertained that such profits have been realized from the use of the trust fund. Those controlling the fund under such circumstances would be careful to make known the loss, and equally as careful to conceal the profits. A court of equity will not hesitate long before saying that the beneficiaries must have some other remedy than a recovery against the insolvent fiduciary. The firm is liable for so much of this fund, with interest from the time of conversion, as Morrill himself admits was appropriated to his own use, and such should have been the judgment below.

Judgment reversed, and cause remanded with directions to enter a judgment as herein directed, and for proceedings consistent with this opinion.

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CASE 58—MANDAMUS—NOVEMBER 14.

Wulftange v. McCollom, Clerk, &c.

83	331
4123	612

APPEAL FROM KENTON CIRCUIT COURT.

1. CONSTITUTIONAL LAW—TITLE OF ACT.—An act of the Legislature, entitled "An act to amend the charter of the city of Covington," which prescribes, among other things, conditions upon which deeds may be recorded in the office of the clerk of the county court, and imposes upon that officer a penalty for doing what it is made his duty to do by the general law regulating conveyances, is, *to that extent*, unconstitutional, as these subjects do not relate to municipal government, and are, therefore, not expressed in the title.
2. MANDAMUS LIES to compel the clerk of the county court to record an instrument which it is made by statute his duty to record.

J. F. & C. H. FISK FOR APPELLANT.

The act is unconstitutional. Its title gives no notice of an intent to provide for the recording of deeds to land. (Cooley's Constitutional Limitations, side pages 142, 144, 147, 149, 151; Constitution of Kentucky, article 2, section 37; article 4, section 30; article 6, section 1; article 13, section 20; General Statutes, chapter 24, sections 2, 8, 9, 14, 21, 23, 31; Jones v. Thompson, 12 Bush, 394; Howell & Clendenning v. Bristol, 8 Bush, 493.)

H. J. GANSEPHOL ON SAME SIDE.

W. H. MACKOY FOR APPELLEE.

1. The Legislature has the power to pass an act of registration which shall be local in its operation. (Johnson v. Higgins, 3 Met., 566; City of Covington v. Voskotter, 80 Ky., 219; Buckner v. Gordon, 5 Ky. Law Rep., 816.)
2. The act in question is not in violation of section 37 of article 2 of the Constitution. The ultimate end to be attained is to be looked at, and not the details leading to that end. (1 Dillon on Municipal Corporations, section 28 (second edition); Cooley's Const. Limit., side pages 143, 144; School District of Ackley v. Hall, 19 Reporter, 260; Montclair v. Ramsdell, 107 U. S., 147; Phillips v. Cov. and Cin. Bridge Co., 2 Met., 219; Johnson v. Higgins, 3 Met., 566; Smith v. Commonwealth, 8 Bush, 108; Collins v. Henderson, 11 Bush, 74; Hoke v. Commonwealth, 79 Ky., 567, 573; City of Covington v. Voskotter, 80 Ky., 219, 221.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is a proceeding by appellant in the Kenton

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Circuit Court for a writ of mandamus, commanding appellee, Clerk of the Kenton County Court, to record a deed by which was conveyed to him the absolute title to a lot of land in the city of Covington.

In his petition, appellant states substantially, as the cause and ground of the application, that May 21, 1884, Holoway and wife executed the deed mentioned, and in due form of law acknowledged it before appellee as Clerk of the Kenton County Court, as shown by his official certificate indorsed thereon. And that on the same day he produced and lodged the deed thus executed and acknowledged by the grantors in the clerk's office for record, paid to appellee the tax for recording required in such cases, and the following indorsement was thereupon made on it: "Left for record May 21, 1884. J. J. McCollom, Clerk." But that afterwards appellee refused to record or to permit the deed to remain in the office for record, and returned it to appellant with the following indorsement on it: "Record refused on account of deed not being indorsed by city auditor, May 23, 1884. Attest: J. J. McCollom, Clerk."

It is further stated in the petition that appellee refused to record the deed upon the sole ground that appellant had not complied with the provisions of an act, entitled "An act to amend the charter of the city of Covington," approved April 28, 1884.

Taking the statements of the petition as true, it is clear that appellee in refusing to record the deed omitted to perform a ministerial act enjoined by chapter 24, General Statutes, and, therefore, appel-

Wulfstange v. McCollom, Clerk, &c.

lant was entitled to the writ of mandamus applied for by him, and the lower court erred in sustaining the demurrer to his petition, if the provisions of the General Statutes regulating conveyances of real estate are to govern exclusively in this case, and that depends upon the validity of the act, the title of which we have quoted; sections 3 and 4 thereof being as follows:

“§ 3. The auditor of the city of Covington shall, on application and presentation to him of title, with the proof which may be necessary and proper in each case, or the proper order of a court, transfer upon the transfer book kept by him in his office, any land or town lot, or part thereof, within the city of Covington charged with taxes upon the tax duplicate of said city from the name in which it stands into the name of the owner, when rendered necessary by any conveyance, partition, devise or otherwise; and if by reason of the conveyance or otherwise, a part only of any tract or lot as charged on the tax list is to be transferred, the party or parties desiring the transfer shall make satisfactory proof of the value of such part as compared with the valuation of the whole, as charged on the tax duplicate, before the transfer is made; but in no case shall any transfer be made by said auditor upon said transfer book of any deed of absolute conveyance of lands or lots in said city, until the city taxes since 1879 due and payable upon the land, lot, or part of lot whose transfer is desired have been paid in full, and proof of that fact has been made to the auditor by the produc-

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tion of tax receipts, or the certificate of the city collector, or the city treasurer, or other legal evidence. The certificate of the auditor upon the deed or other evidence of title presented to him that the proper transfer of the real estate therein described has been made in his office, shall authorize the county clerk of the county of Kenton to admit such deed to record."

"§ 4. No deed of absolute conveyance of land or lots in said city of Covington shall be admitted to record by the county clerk of Kenton county until the same has been presented to the auditor of the city of Covington, and by him indorsed "transferred," or "transfer not necessary." If the clerk of said county court shall admit to record any deed of absolute conveyance not so indorsed, he shall forfeit and pay to the city of Covington the sum of ten dollars in each case, to be recovered by said city by suit in the mayor's court thereof."

Counsel for appellant contends that the act in question is invalid, because passed in violation of section 37, article 2 of the Constitution, which is as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

As held by this court in *Philips v. Covington and Cincinnati Bridge Co.*, 2 Met., 219, such a construction should be given to the clause "as is necessary to render it effectual in accomplishing the object for which it was designed; but it should not be so construed as to restrict legislation to such an extent as to render different acts necessary where the whole

subject-matter is connected, and may be properly embraced in the same act."

The object of that clause was to prevent the enactment of any law under a deceptive title, or that embraces subjects having no obvious relation to each other, and which, in their nature, are diverse and unconnected; but, as heretofore held by this court, only so much of such an act is invalid as is not indicated by the title, such parts as do conform thereto being regarded as operative.

The question then arises whether the act we are now considering embraces more than one subject in the meaning of the Constitution? And if it does, whether the subject of the two sections quoted is expressed in or indicated by the title?

The whole of the act, except those two sections, appears to relate to subjects connected with the municipal government of the city of Covington, and such as are usually, and may legitimately be, embraced in a city charter or acts amendatory of it; but sections 3 and 4 relate to the conveyance of real estate situated in the city of Covington, a subject which, from the organization of the State government, has been regulated by general laws, intended to be uniform in their operation, and which it is of vital importance should be stable and certain.

It never has been the policy of this State, nor should it be of any government, to impose restraints upon alienation of real estate by deed made in good faith. On the contrary, one of the principal objects of the creation of the office of county court clerk by the Constitution was to facilitate such transfers, and

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to perpetuate evidence of title to real property; and by general laws existing from the beginning, and modified from time to time, only to more effectually carry out the object, such clerk, in every county, is required, under penalties, to record all deeds conveying real estate presented to him for the purpose, as the deed in question was presented by appellant.

But sections 3 and 4 of the act not only prescribe conditions upon which deeds may be recorded in the office of the clerk of the Kenton County Court, extraordinary in their nature, and in many cases impossible to be complied with, but impose a penalty upon a constitutional officer for doing what it is made his duty to do by the general laws regulating conveyances.

Whether, if the provisions contained in the two sections referred to were embodied in a separate act, and expressed in the title thereof, they would be valid, need not be decided; but it seems clear to us that the subject of recording deeds to real estate in the clerk's office of the Kenton County Court has no relation to or connection with the municipal government of the city of Covington, and that the title of the act before us is not such as would fairly apprise the people, or the members who vote on it, that it contained provisions requiring the approval of the city auditor of Covington as a condition of recording such deeds, and imposing penalties upon the clerk who does so without such approval.

The issuing of marriage licenses, or recording last wills and testaments by the same officer, would have been as fit subjects of the act, and as readily suggested by its title as the recording of deeds.

Smith, &c., v. Cansler.

The judgment is reversed, and cause remanded, with directions to the lower court to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

CASE 54—PETITION EQUITY—NOVEMBER 8.

Smith, &c., v. Cansler.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

83	367
89	421
83	367
93	187
83	367
104	801

1. WHERE TIME IS NOT OF THE ESSENCE OF A CONTRACT for the sale of land, the inability of the vendor to make a good title at the time of the contract, or at the time agreed upon for performance, will not entitle the vendee to a rescission, the vendor's title being subsequently made perfect; and even though the vendor is not able to comply with his contract when the suit for rescission is instituted, yet if he can perfect his title within a reasonable time the court will give him an opportunity to do so. In this case, however, the property agreed to be conveyed being the property of the vendor's wife, and the improvements having been destroyed by fire before a sufficient deed was tendered, the vendee can not now be required to accept a deed and pay the purchase money, the vendor having ample time before the fire to make the deed, which, by the contract, was to have been made on a certain day, and furnishing no sufficient excuse for not doing so.
2. A *DE FACTO* OFFICER is one who exercises the duties of an office, claiming the right to do so under some commission or appointment. One who had been a deputy clerk in the county during the first term of the clerk continued to act as such without re-appointment, after his principal had entered upon his second term. *Held*—That he was not a *de facto* officer.

FELAND AND WOOD FOR APPELLANTS.

1. The modern rule is, that although the title of the vendor was defective when the contract was made, or even at the date of the institution of the suit for a rescission, yet, if time is not of the essence of the contract, the Chancellor will give the vendor an opportunity to perfect his title, if he can do so within a reasonable

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- time. (Logan, &c., v. Bull, 78 Ky., 618; Woodson v. Scott, 1 Dana, 471; Craig v. Martin, 8 J. J. Mar., 53; Cotton v. Ward, 3 Mon., 818.)
2. The facts of this case show that time was not of the essence of the contract.
 3. The vendee, by concurring in the proceedings for remedying the defect in the title, waived his right to rely upon the want of mutuality in the contract. (Fry on Specific Performance, section 293; Salisbury v. Hatcher, 2 Y. & C. C. C., 54; Hoggart v. Scott, 1 Russ. & M., 293.)
 4. The deputy clerk who first took the acknowledgment was a *de facto* officer, and, therefore, his acts as to third persons should be regarded as binding. (Wilson v. King, 3 Litt., 459; Justices v. Clark, 1 Mon., 86; Rice v. Commonwealth, 3 Bush, 17; Hoglan v. Carpenter, 4 Bush, 90.)
- J. I. LANDES FOR APPELLEE.
1. The rule requiring that contracts to be specifically enforced must be mutual applies to this case. (Fry on Specific Performance, section 286.)
 2. Time is of the essence of the contract sued on. (Page v. Hughes, 2 B. Mon., 441; Magoffin v. Holt, 1 Duv., 95; Jones v. Noble, 3 Bush, 695.)
 3. Time, although not ordinarily considered in equity *essential*, is always regarded as *material*, so that a party who, without reasonable excuse, is in default as to time, will be denied the remedy of specific enforcement where injury results to the other party against whom it is sought. (Pomeroy's Eq. Juris., section 732; Woodson's Adm'r, &c., v. Scott, 1 Dana, 470; McKay v. Carrington, 1 McLean, 50.)
 4. The deeds tendered October 25th and 30th were not effectual, because they were not acknowledged before a legally authorized officer. (General Statutes, chapter 24, sections 15 and 21.)
 5. The deed tendered October 25th, before the fire, contained no sufficient description of the property, and the tender was, therefore, not good. (Williams v. Abrahams, 3 Bush, 187.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellee, Polk Cansler, being in possession of the property as the tenant of the appellant, G. W. Smith, they entered into the following contract:

"This contract, made and entered this 21st day of October, 1882, between G. W. Smith and Polk Cansler, witnesseth:

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"That said Smith has sold to said Cansler *his* livery, feed and sale stable, on corner of Russellville and Virginia streets, in the city of Hopkinsville, for the sum of (\$3,500) thirty-five hundred dollars—deed to be made, payment made and notes executed on Monday next.

G. W. SMITH,

(Signed)

"POLK CANSLER."

The property, in fact, belonged to the wife of G. W. Smith, the appellant S. E. Smith; and while her husband testifies that he both acted for himself and as her agent in making the trade, yet he admits that he did not disclose the agency.

The appellee says that he had rented of the husband, and supposed that the property belonged to him when he made the purchase. No deed was tendered until, as appellant says, the following Tuesday, while the appellee says that it was Wednesday; and he is confirmed in this statement by other testimony. No reason is given for the delay, or why it was not done on Monday. It doubtless resulted from mere neglect upon the part of appellants.

The one so tendered was signed, and had been acknowledged, by both of the appellants before one B. M. Harrison, as a deputy of the county court clerk. It appears that the latter officer was then serving a second term; that during his former one Harrison had been appointed and qualified, not as an office deputy, but as one in the country, and that he had never been appointed or qualified as a deputy since the clerk entered upon his second term. No objection, however, was made to the deed upon this score, owing, beyond question, to the fact that all the

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parties to it supposed that Harrison was a regular deputy. It was received by the appellee, and at once taken to his attorney for examination, who objected to it for insufficiency of description of the property, and because of some other supposed slight formal defects, and it was then, and upon the same day, returned to the appellant, G. W. Smith, with the request that another deed be made. He received it for this purpose; and from the circumstances, the receiving of the deed by Cansler was evidently an acceptance of it, only upon the condition that it was satisfactory to him after an examination by his attorney. The stable was destroyed by fire, without appellee's fault, upon the night of Wednesday, October 25th, and before a second deed had been prepared, the only reason given for the delay by the appellants being that the draftsman of the first deed could not be found.

Upon October 30th following another deed was tendered to the appellee, but it had also been acknowledged before Harrison, and the appellee refusing to accept it or take the property, this action was brought on November 2, 1882, to compel him to do so. During its pendency another deed, properly executed and acknowledged by the appellants before a regular or legal deputy clerk, was tendered to the appellee, and it is now insisted that the deed which was tendered before the fire, and also the second one that was tendered before the bringing of the suit, were acknowledged before a *de facto* officer, and were, therefore, sufficient; but even if mistaken in this, it is next urged that time was not of the essence of the con-

tract, and as a sufficient deed was tendered before the *hearing* of the cause, that the appellee should have been compelled to accept it, and a decree rendered for a specific execution of the contract of October 21, 1882, although the owner of the property had not joined in it.

The rescission of a contract, or its specific performance through a court's power, is not a matter of right in a party.

It is to be exerted when the court, in the exercise of a reasonable discretion, finds that general rules or principles will not, under the circumstances of the particular case, furnish an exact measure of justice.

Mutuality of obligation is in general necessary to the validity of a contract, and it is a general rule that, in order to be binding, it must be enforceable by either party. If, however, one is not invested with such a title as he undertakes by his contract to make to a purchaser, yet, if time be not of the essence of it, and he is able to make title when the time for performance arrives, and tenders the deed, then it will be enforced, although his title was defective at the date of the contract; and in such a case if a rescission be asked by the other party, and the vendor is not able at the time of the institution of a suit for this purpose to comply with the contract, yet if he can perfect the title within a reasonable time the court will afford him an opportunity to do so. (*Logan and Wife v. Bull, &c.*, 78 Ky. Reps., 617.)

We think that this may now be regarded as the settled equitable rule, although expressions may be

found in some of the elementary books to the effect that a rescission will be granted or a specific execution denied in case one had not such a title at the time of contracting as he bound himself to convey.

As a sufficient deed was tendered before the *hearing* of the cause, it follows that the appellants were entitled to enforce the contract under the above rule, allowing, as we must, that the deeds acknowledged before Harrison did not bind the wife, unless some circumstance has been shown which makes this case an exception to it, and brings it within some qualification of the rule. It is virtually admitted, as is indeed beyond question, that Mrs. Smith was not bound by the contract of October 21, 1882.

If she were, then there is no trouble in hand. It is urged, however, that the deed which was tendered before the fire did bind her, owing to its having been acknowledged before a *de facto* officer, as is claimed. Such an officer is one who exercises the duties of an office, claiming the right to do so under some commission or appointment.

Harrison was acting from his own will and by self-appointment only. Moreover, section 21, chapter 24 of the General Statutes, provides that "a deed of a married woman, *to be effectual*, shall be acknowledged before some of the officers named in the preceding sections, and lodged in the proper office for record."

No estoppel as to her existed. The so-called deed was no more than a contract as to her. She was not *sui juris*, and the appellee could not have enforced it as against her. If the equitable title had passed and been in the appellee when the fire occurred,

then, beyond question, the appellants would have been entitled to the relief they are now seeking.

We now return to the question whether they are entitled to it because, before the final hearing, they tendered a sufficient deed to the property. Between the time of doing so and the contract of October 21, 1882, the stable had been destroyed by fire without the appellee's fault. The appellants were in fault in not having a sufficient deed made and tendered to the appellee before the property was materially changed in its value or character. It is true that this did not result from any improper motive, but from mere neglect; but this does not affect the rule which equitable considerations dictate should be applied under such circumstances.

It has been held that where there is a want of mutuality in the obligation, time is generally essential as well in equity as at law (Page v. Hughes, &c., 2 B. Monroe, 439; Magoffin v. Holt, 1 Duvall, 95); and where there has been unnecessary delay or neglect in complying with it upon the part of the party seeking to enforce it, and in the meantime the character of the property has materially altered, a court of equity, in the exercise of a discretion given to it because strict law or general principles would not "furnish any exact measure of justice between the parties," should not look with favor upon the applicant.

It was said in the case of Woodson's Adm'r v. Scott; 1 Dana, 470, that "the demands of equal justice would seem, therefore, to require the Chancellor to overlook delay on the part of the vendor, which

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is the result of mere supineness, *and which has not prejudiced the vendee in any ascertainable mode or degree.*"

Story says: "Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. It is true that courts of equity have regard to time so far as it respects the good faith and diligence of the parties; but if circumstances of a reasonable nature have disabled the party from a strict compliance; or if he comes, *recenti facto*, to ask for a specific performance, the suit is treated with indulgence, and generally with favor by the court; but then, in such cases, it should be clear that the remedies are mutual; *that there has been no change of circumstances affecting the character or justice of the contract*; that compensation for the delay can be fully and beneficially given; that he who asks a specific performance is in a condition to perform his own part of the contract; *and that he has shown himself ready, desirous, prompt and eager to perform the contract.*" (2 Story's Equity, section 776.)

The appellant, Smith, has been guilty of laches, and furnishes no sufficient excuse for the delay in making the deed, which, by the contract, was to have been made upon a certain day; there was ample time to do so before the destruction of the stable; he has not shown himself "ready, desirous, prompt and eager to perform the contract;" there had, before a sufficient deed was tendered, been a

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“change of circumstances affecting the *character* or *justice* of the contract;” and its enforcement would now be oppressive to the appellee.

Judgment affirmed.

CASE 55—PETITION ORDINARY—NOVEMBER 14.

Stewart v. Hall, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT.

1. **LIBEL—PRIVILEGED WORDS.**—In an action for libel, if the words charged were spoken on an occasion which renders them *prima facie* privileged, the burden is on the plaintiff to show express malice.
2. **WORDS SPOKEN IN A JUDICIAL PROCEEDING**, whether by a party, by a witness, or by counsel, are *prima facie* privileged.
3. **CASE ADJUDGED.**—The defendant in an action, in giving his deposition, was cross-examined by counsel for plaintiff as to a newspaper publication, which contained a libel upon the defendant, and this publication, having thus become a part of the testimony, was re-published by counsel for plaintiff in his printed brief. Upon final hearing, the publication was excluded as being incompetent. This is an action by the defendant in that action against the plaintiff and his counsel for libel. *Held*—That neither is liable, as they had reasonable ground to believe that the publication was competent testimony, and there is nothing tending to show that they did not so believe.

M. A. & D. A. SACHS FOR APPELLANT.

1. What a witness says must be pertinent, or believed so by him, in order to be privileged. (White v. Nichols, 8 How., 266; White v. Carroll, 42 N. Y., 161; Barnes v. McCrate, 32 Maine, 442; Hawkins v. Summer, 13 Wis., 193; McLaughlin v. Cowley, 127 Mass., 316; Story v. Wallace, 60 Ill., 51; Morgan v. Booth, 13 Bush, 480; Forbes v. Johnston, 11 B. Mon., 51; Thom v. Blanchard, 5 Johns., 523; Elam v. Badger, 23 Ill., 498; Gilbert v. People, 1 Denio, 41; Odgers on Libel and Slander, side pages 266, 268, 269; R. v. Lord Abbingdon, 1 Esp., 226; R. v. Creery, 1 M. & S., 273.)

83	375
98	498
83	375
113	368

83	375
1126	231

83	375
138	589

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2. Where the occasion renders the publication privileged, the jury may take the language into consideration to determine the intent. (Townshend on Slander and Libel, sections 244b, 288, 388, 399; 19 Md., 450.)
3. Whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury *alone*, ought to determine. (Addison on Torts, section 1169; Campbell v. Gray, 5 Ky. Law Rep., 240; Nix v. Caldwell, *Ibid.*, 275.)

WALTER EVANS FOR APPELLEES.

1. The alleged defamatory matter having been published in the course of a judicial proceeding, to-wit: In the brief of counsel, furnished to the court, pursuant to its rules, it was *absolutely* privileged. (Odgers on Libel and Slander, side pages 182, 183, 184 and 186.)
2. If not *absolutely* privileged, the manner and occasion of its publication show it to be privileged, unless it is alleged and proved by the plaintiff that there was express malice, and that the publication was made in bad faith, wantonly and needlessly, and as a mere cover to an attack upon plaintiff's character. (Odgers on Slander and Libel, side pages 183, 184, 190, 196 and 197; Forbes v. Johnson, 11 B. M., 51; Townshend on Slander and Libel, section 209 and note, 224 and note, 224a and note, and sections 225 and 226.)
3. The burden of proof is upon the plaintiff to show this express malice. (Odgers on Slander and Libel, side page 269; Harper v. Harper, 10 Bush, 455.)
4. When the facts are ascertained, the judge is to decide whether the publication is privileged. (Odgers on Slander and Libel, side page 185.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The property of the Jeffersonville and Fifteenth Street Christian Church, in Louisville, having been sold for the payment of certain liens, there remained after their payment a considerable fund, which was claimed by each of the two parties then existing by reason of a division in the church. An action was brought in the Louisville Chancery Court of the style of Smith, &c., v. Hagerman, &c., to settle the right to it. The prime cause of the

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division was the election of the appellant, W. W. Stewart, to an eldership in the church, and his subsequent removal upon the alleged ground that he was "not of good report." It was claimed by the Stewart or "Hagerman party," that the "Hall-Skene party" had, by the adoption of what the former denominated "a creed," dissolved their relation with the church, as it recognized no guide in religious matters save the Bible. Upon the other hand, the Hall-Skene party said that they had only adopted rules of church discipline, and that the other party had voluntarily abandoned the church, owing to its action as to Stewart. The question of whether a "schism" existed within the meaning of the statute, which regulates the property rights of the parties in such a case, was involved, and each side, therefore, proceeded to take testimony as to the division, and the causes which had led to it. The deposition of the appellant, Stewart, was taken upon the part of the defendants, he testifying at length as to the matters involved, and upon his cross-examination a printed article, which reads thus, and which had been published in the Christian Standard or the American Christian Review, or perhaps in both, was presented to him, and he was asked by the appellee Evans, who was the counsel for the plaintiffs in the suit (the appellees, Hall and Skene, who were plaintiffs in the suit, also being present), whether he was the same person named in it, and he was then examined as to the matters mentioned in it:

"To whom it may concern: Wm. W. Stewart and

Stewart v. Hall, &c.

his wife Margaret, from Edinburgh, Scotland, were separated from the First Church of Christ, in this city, for gross dishonesty, about six months ago, since which time they and their family, consisting of a daughter about twenty years of age, three sons, aged respectively about eight, thirteen and fifteen years of age, have gone South. When last heard from, they were at Atlanta, Ga., purposing to go to Montgomery, Ala. From the last number of the 'Standard,' it appears that he or they are now in Texas. When they came here, about twelve years since, he had the assumed name of Henderson, and, as it now appears, they have long been living on others. That they will continue to do so as far as they can there is little doubt. He was in the boot and shoe business here, and failed or compromised every two or three years, in the meantime borrowing wherever he could get money, or indorsements to raise it, and finally left them to pay his debts as best they could. He is of quiet, pleasant demeanor, of steady habits, and religious; withal, is very apt to make friends, perchance victims. It is deemed an act of simple justice that our generous-hearted brethren should be placed on their guard.

"Done by order of the Church.

"J. M. L. CAMPBELL, Church Clerk.

"Detroit, January 20, 1871."

It is the practice, and perhaps a rule, of the court in which the suit was pending to require the parties to file briefs before the hearing, and the case having been argued, the appellee Evans' argument was printed by and at the cost of one who was in-

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terested in the case, but is not a party to this action, and filed as the brief in the case. In the discussion he had referred to and quoted said printed article, it being then a part of the testimony (although subsequently, and by the final judgment, it was stricken out of the record, and excluded as incompetent evidence), and hence it was re-published in the brief.

The appellant, Stewart, then brought this action for libel against the appellees, E. G. Hall, Wm. Skene and Walter Evans, basing it both upon the publication by them of said article when his deposition was taken and the printing of it in the brief.

The appellees denied that they were actuated by malice toward the appellant, and in their answers set forth in detail the circumstances of the publication; that they acted in good faith, and believed, even if it were not, that the alleged libel was pertinent, and material evidence for them.

Malice not being implied from the publication, owing to the occasion and circumstances under which it was made, the appellant attempted to show express malice upon the part of the appellees toward him, by proving what had taken place or been said by them in the business or regular governmental meetings of the church. This evidence, however, only tended to show that two of the appellees had been present at said meetings, and that one, or perhaps both, of them had taken a part in the discussion relating to the appellant as an elder, and in deposing him from his office; and at the close of the plaintiff's testimony the court, upon the motion of the defendants, instructed the jury to find for them.

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The essence of libel is malice. The mind must be at fault. If the language is actionable, then the publication is presumed to have been malicious, unless the occasion rendered it *prima facie* privileged. If so, then the legal effect of privilege is to rebut the legal inference of malice arising from the words, and the burden of proving malice in fact, or express malice, is then upon the plaintiff, and this is not shown by the mere falsity of the publication, in the absence of evidence that the publisher knew it to be false.

It was said in the case of Morgan v. Booth, 13 Bush, 480: "A party to a judicial proceeding may, by himself or counsel, write or say any thing of and concerning the case, or of a witness who testifies in the case, that is pertinent and material to the matter in controversy, and he can not be held to answer for scandalous words, unless, under the pretense of pleading his cause, he designedly wanders from the point in question, and maliciously heaps slander upon the party whose conduct or evidence is under consideration; and so long as it can be said that such party confines himself to that which is pertinent and material, he is under no obligation to show that his words are absolutely true, and can not be made to answer for maliciously saying that which the law permits him to say.

The ends of justice require that there should be a free resort to judicial tribunals. Public policy dictates that a man should not be hampered in the prosecution or defense of his rights by the fear of actions for libel or slander. If, however, he abuses

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this right by needlessly using it as a cloak to conceal his private malice, and acts from a wrong motive, then he should be held responsible. It is only privileged for some reason, and the occasion must be used for that reason.

The law only requires, however, good faith, and not infallible judgment; and the rule is the same as to a party to a suit, witness and counsel; and also whether the words be spoken or published in a strictly judicial proceeding or one *quasi* judicial, like the proceedings of and between the members of a church to enforce its discipline. (Townshend on Slander and Libel, section 233; Lucas v. Case, &c., 9 Bush, 296; Nix v. Caldwell, 81 Ky. Rep., 293.)

It is urged, however, that the article in question was not pertinent or material to the case, and that this fact was conclusively settled by the judgment of the court excluding it. This was not done, however, until the final judgment in the action was rendered. Great latitude is permissible upon a cross-examination. Its object is to enable the jury or court to understand the witness, and give to his testimony the proper weight. A question not strictly relevant, but which is collateral, may be asked him in order to show that he has, by some disgraceful conduct, rendered himself less credible, or to fix his identity and antecedents. It is unnecessary, however, to decide whether the article in question was competent testimony. There is no evidence in the record even tending to show that the appellees did not so believe; and as the questions at issue involved the causes of the division in the church, they had reasonable cause

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to so believe. In fact, it is alleged in the pleadings of the appellees, and not denied, that they did so believe.

Whether words, otherwise actionable, are privileged is a question of law for the decision of the court, depending upon the circumstances of their utterance or publication, and when ascertained to be so, then the question of good faith in their use arises, and the existence of malice may be shown by evidence *aliunde*; but whether any malice has been thus shown, or whether it arises intrinsically from the publication itself, or whether it has been made to appear in either way, is a question for the determination of the court. In this instance the defendants did not originate the publication, and there is no evidence of any personal hostility. It is only said that the appellees "in a congregational capacity" showed bitterness. Even the appellant did not testify to any statement or particular fact showing it, but, in substance, only gives his opinion when he says that, from their conduct, they wished to degrade him, because he does not state in what the conduct consisted.

It was held in the leading case of *Hodgson v. Scarlett*, 1 B. & A., 245, that if the alleged libelous words are published in a judicial proceeding, with probable cause and without express malice, that they are privileged. The implication of malice or a bad motive, which would arise ordinarily from the use of the words, being rebutted by the occasion, its existence must be shown by extrinsic evidence, and if the party using them was not actuated by malice,

but in good faith believed that they were material in the case, and the attending circumstances justified the belief, then he is not liable. If, under all the circumstances, he may deem the statement reasonably necessary to his cause, and there is an absence of malice as a cloak for defamation, then public policy requires that he should not be held liable, even if the statement be untrue, and although the other party thereby suffers in reputation. We think this is the correct rule, and that it is sustained by both reason and authority. The line which separates relevant from irrelevant testimony is often quite shadowy and indistinct, "and the position of counsel or parties conducting a cause would be full of peril if the imputation of legal malice was incurred whenever, from ignorance of law or frailty of judgment, criminatory remarks of an irrelevant character might be made." (Allen v. Crowfoot, 2 Wend., 515; Lea v. White, 4 Sneed, 111; Vausse v. Lee, 1 Hill (S. C.), 197; Lawson v. Hicks, 38 Ala., 279; Townshend on Slander and Libel, section 224.)

The publication in the brief was, so far as the attorney is concerned, in discharge of his duty; and as to all three of the appellees, it was in defense of their rights. It was only a fair report of what occurred in a judicial proceeding, and is privileged, because the interests of the public so require. As the appellees did not originate the alleged libelous article, it can not, in view of the occasion, be claimed that there was intrinsic malice shown by it as to them, and we have already seen that there was no extrinsic evidence of it, and the non-suit was, therefore, properly ordered.

Judgment affirmed.

Garrott, &c., v. Ratliff. Same v. Williams.

CASE 56—PETITIONS ORDINARY—NOVEMBER 17.

Garrott, &c., v. Ratliff.
Same v. Williams.

APPEALS FROM CHRISTIAN CIRCUIT COURT.

1. **BILLS OF EXCEPTIONS.**—A positive or direct statement in a bill of exceptions that it contains all the evidence, or all the instructions given and refused, is not essential to make the bill complete. When it appears from the bill that instructions were given by the court of its own motion, or for the plaintiff and then for the defendant, or at the instance of the one party or the other, and then instructions by the court, the bill, so far as the instructions are concerned, will be regarded as complete, unless it appears upon the face of the record that other instructions were given or refused. So, if the bill shows that the plaintiff introduced his testimony, and then the defendant introduced his testimony, or examined the following witnesses, the presumption is that the bill contains all the evidence.
2. **SAME.**—Where the instructions are not excepted to, it is immaterial whether or not they are in the bill of exceptions, as the only question to be considered is the sufficiency of the evidence to support the verdict.
3. **CERTIFICATE OF JUDGE.**—The signing by the judge at the foot of the bill of exceptions is in substance certifying that it contains all the evidence, or that the bill of exceptions is true, whichever it may be proper for him to certify, as provided by section 339 of the Code.
4. **AFFIDAVITS TO CONTROVERT BILL.**—The truth of what the judge certifies in the bill of exceptions as to his own rulings and exceptions taken during the progress of the trial can not be controverted by affidavits.
5. **WHERE THE INSTRUCTIONS ARE NOT INCORPORATED IN THE ORIGINAL BILL OF EXCEPTIONS,** but the clerk is directed to "here insert," and does so in making out the transcript, the instructions thus inserted will be considered as if originally embodied in the bill, unless the appellee comes with an affidavit that they are not the instructions directed to be inserted.
6. **RATIFICATION OF FORGERY.**—Where one's name has been signed to a note as surety without his authority, a subsequent promise to pay the note is not binding.
7. **UNDER A PLEA OF NON EST FACTUM,** the obligors in a note can not, upon the ground that they were sureties, require the plaintiff to show that their names were signed by their *written* authority.

Garrott, &c.. v. Ratliff. Same v. Williams.

A. DUVAL FOR APPELLANTS.

1. The clerk having inserted the instructions in transcribing the bill of exceptions, pursuant to the direction "here insert," the bill is thereby made complete. (*Meaux v. Meaux, &c.*, 5 Ky. Law Rep., 550.)
2. The statement of the judge in the bill of exceptions as to his own rulings can not be controverted by affidavits.
3. The bill of exceptions was properly certified. (Civil Code, section 335, subsection 2; *Ibid.*, section 389.)
4. Section 387 of the Code does not apply to a motion for either a peremptory instruction, or for an instruction as in case of non-suit. (*Loving v. Warren County*, 14 Bush, 316; *Coffman v. Wilson*, 2 Met., 542; *Halloran's Adm'r v. L. C. & L. R. R. Co.*, MS. Op., Sept. 22, 1883, 5 Ky. Law Rep., 245; *Addison v. Crow*, 5 Dana, 271.)
5. The court will presume that the instructions appearing in the bill were all the instructions given or refused, in the absence of some fact in the record indicating that there were additional instructions. (*Merriwether v. Tucker*, MS. Op., Oct. 25, 1881; *Smith v. Commonwealth*, 1 Duvall, 224; *Mickey v. Commonwealth*, 9 Bush.)
6. A mere recognition or admission by the defendants of the genuineness of the notes is not sufficient to bind them. (*Warren v. Fant's Trustee*, 79 Ky., 2.)

W. LINDSAY AND JOHN FELAND ON SAME SIDE.

W. P. D. BUSH FOR APPELLEES.

1. As the instructions were not embodied in or identified by the bill of exceptions, they can not be considered. (*Forest v. Crenshaw*, 4 Ky. Law Rep., 596; *City of Columbus v. Duffy*, *Ibid.*, 880; *Barclay v. Smallhouse*, *Ibid.*, 894; *Cooper v. Cooper*, *Ibid.*, 900.)
2. As instruction No. 2 was not excepted to when given, any supposed error in giving it is unavailing in this court. (*Kennedy v. Cunningham*, 2 Met., 540; *Letton v. Young*, 2 Met., 564; *Russell v. Marks*, 3 Met., 41; *Tudor v. Lewis*, 8 Met., 381; *Cox v. Winston*, 8 Met., 577; Civil Code, section 384.)
3. The circuit judge must "certify that the bill of exceptions is true," in order to make it valid. (Civil Code, section 389.)
4. The affidavits *controverting* and *maintaining* the truth of the bill of exceptions establish the fact that exceptions to the giving and refusing of instructions were not taken *at the time*, and, therefore, such exceptions are untruly inserted in the bill, and are unavailing.
5. There can be no reversal for an error in giving or refusing instructions, unless the bill of exceptions shows affirmatively that it includes "all instructions given and refused." (Civil Code, subsection 2 of section 387; *City of Columbus v. Duffy*, 4 Ky. Law vol. 83.—25.

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Rep., 830; Dulaney v. Nunnery, 5 Ky. Law Rep., 814; Harvey v. Payne, 2 Met., 452; Heydon v. Lockhart, 1 Bibb, 808; Taylor v. Chaplin, 8 Mar., 492; Jones v. Williams, 4 Mon., 42; Cravins v. Grant, 4 Mon., 126; Huffaker & Shy v. National Bank of Monticello, 18 Bush; Gray v. Campbell, 5 Ky. Law Rep., 510; Turner v. Hagan, 8 Ky. Law Rep., 255; Flood v. Pragoff, 79 Ky., 607; L. & N. R. Co. v. Brown, 8 Ky. Law Rep., 82; Criminal Code of 1854, section 385; Criminal Code of 1877, section 341; Clem v. Commonwealth, 8 Met., 10; Jane v. Commonwealth, 8 Met., 18; Smith v. Commonwealth, 1 Duvall, 224; Mickey v. Commonwealth, 9 Bush, 593.)

6. Such an instruction as that complained of in this case has been approved by this court. (Forsythe v. Banta, 5 Bush, 547.)

CAMPBELL & GAITHER AND PETREE & LITTELL ON SAME SIDE.

1. One may become bound on a note by admitting or recognizing his forged signature thereto as genuine. (Forsythe v. Banta, 5 Bush, 547.)
2. A surety can not rely upon the fact that his name was signed without his *written* authority unless he pleads his suretyship. (Pomeroy on Remedies and Remedial Rights, pages 677, 681, and 703-705.)
3. The bill of exceptions should show that exceptions to instructions were taken at the time the instructions were given. (Civil Code, section 384; Kennedy & Bro. v. Cunningham, 2 Met., 538.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

A positive or direct statement in a bill of exceptions that it contains all the evidence, or all the instructions given and refused, is not essential to make the bill complete. When an appeal is prosecuted to this court upon an issue of fact, and the law applicable to that issue, and a reversal is asked because the verdict is not sustained by the evidence, it is the duty of the trial court to give a statement in detail of all the evidence in the case, and each and every instruction given or refused where exceptions have been taken to the instructions. If there is no exception to any of the instructions, it is im-

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material whether they are in the bill or not, as, in such a case, the only question presented to this court for consideration will be: "Is there any evidence to support the verdict?" If the objection to the judgment below is not to the want of evidence to support the verdict or judgment, but to the admission or rejection of testimony, as provided by section 335, Civil Code, the material facts must be stated in the bill that the evidence conduced to establish. The presumption will be indulged by this court in favor of the truth of the bill of exceptions, and when it appears from the bill that instructions were given by the court of its own motion, or for the plaintiff and then for the defendant, or at the instance of the one party or the other, and then instructions by the court, the bill, so far as the instructions are concerned, will be regarded as complete, unless it appears upon the face of the record that other instructions were given or refused; and so of the evidence, the bill showing that the plaintiff introduced his testimony, or the following testimony, and then the defendant introduced his testimony, or examined the following witnesses, the presumption is that the bill contains all the evidence.

The purpose of the appeal is to reverse the judgment of the trial court by reason of an error committed to the prejudice of the party appealing, and the judge signing the bill of exceptions, in order that his own rulings may be tested, and also to protect the rights of the litigants, must be presumed to have embodied in the bill all the evidence and all the instructions in every case where it is necessary

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that all the evidence or all the instructions should be before this court, in order that the action of the court below may be affirmed or reversed.

This court has no right to say, upon reading a record containing a bill of exceptions, that the court below has failed to certify a complete bill, unless it so appears upon the face of the record.

Section 339 provides: "In cases in which, by subsection 2 of section 335, the evidence is required to be stated in full, the judge shall certify in the bill of exceptions that it contains all the evidence. In all other cases he shall certify that the bill of exceptions is true."

The signing by the judge in either case at the foot of the bill is, in substance, certifying that it contains all the evidence, or that the bill of exceptions is true.

The judge below, and the counsel for each litigant, look to the preparation of the bill of exceptions with a view of presenting the exceptions in a proper form to this court, and when coming here with the signature of the judge, and nothing to show an omission from the record of a part of the evidence, or a part of the instructions (when all should be embodied in the bill), the bill will be regarded as in compliance with the provisions of the Code.

Under the former practice cases can be found where bills of exceptions have been excluded on extremely technical grounds by adhering to the very letter of the Code, when the court, too, upon an inspection of the record, must have been satisfied that the bill was complete. These decisions pro-

ceeded upon the idea that it must affirmatively appear that the bill contained all the evidence, or all the instructions, when the signature of the trial court, where the record failed to show any omission of the evidence or instructions, was all that should have been required. The bill of exceptions in this case appearing to be complete, there is no reason for disregarding it.

In this case it appears from the bill that when giving instruction No. 2 by the court on its own motion, *the defendants excepted*, and when refusing to give instruction No. 6 *the defendants excepted*.

Affidavits of counsel appear in the record, showing that these exceptions were not taken as they appear in the bill, and were not reserved until after the trial. These affidavits will not be considered as destroying the verity of the record when certified by the court below to be proper. The truth of what the judge states or certifies as the bill of evidence may be controverted by the affidavits of by-standers in the form of a bill of evidence; but when he certifies as to his own rulings and exceptions taken during the progress of the trial, we know of no practice that authorizes his statement, or the verity of the record as made up, to be assailed either by by-standers or the affidavits of parties interested in the litigation.

This action was instituted on two promissory notes, to which the defendants pleaded *non est factum*. The court at the close of the testimony said, in substance, to the jury, that although the defendants did not sign the notes, yet if, after they were signed

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or put in circulation, they recognized the notes as genuine, they are liable. This was erroneous. The defense asked the court to instruct the jury that if the names of the defendants were signed to the notes sued on by some other person without written authority, they must find for the defendants, and no subsequent ratification will be binding unless in writing, &c.

We find no pleading in the record by the defendants presenting such an issue, and therefore the instruction was properly refused.

The only issue in the case is, did these appellants sign their names to the paper? Are the signatures genuine? Their signatures, if not genuine, were placed to the paper without authority, and in such a case a subsequent promise to pay the note would not be binding. If these defendants, or either of them, had induced the obligors or their assignees to part with their money, or purchase the notes upon their statement that their signatures were genuine, it would present another and different question.

The original bill of evidence has been brought to this court, showing that, in making out the bill, the words "here insert the instructions" are found in the bill, and when made out, the clerk, following the directions of the court, inserted the instructions that are embodied in the bill in this court, with the signature of the judge annexed. This was the proper way of making out the bill, and when counsel attempt to show a failure of the clerk to identify the instructions when making up the record, they must come with an affidavit showing that the instructions

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found in the bill were not those given or refused. (Meaux v. Meaux, 81 Ky., 475.)

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

CASE 57—PETITION EQUITY—NOVEMBER 19.

Jones' Adm'r v. Jenkins, &c.

APPEAL FROM CALDWELL CIRCUIT COURT.

FRAUDULENT MORTGAGE.—As the mortgagee now acquires only a lien by his mortgage, a court of equity will not enforce a mortgage executed for the sole purpose of defrauding the mortgageor's creditors, either as against the mortgageor or as against purchasers for value; nor will the court give the mortgagee a personal judgment on the mortgage note, the note being without consideration.

In this case the mortgaged property has passed into the hands of purchasers for value, and the court holds that it is immaterial whether the purchasers had either actual or constructive notice of the mortgage, as, in no event, can the mortgage be enforced, it being fraudulent.

G. W. DUVALL FOR APPELLANT.

1. The plea of the defendant that the note and mortgage were executed without a "*valid*" consideration was not sufficient. (Willett v. Forman, 8 J. J. Mar., 293; Helm's Ex'r v. Jones' Adm'r, 9 Dana, 27; Morton v. Waring's Heirs, 18 B. Mon., 82.)
2. The plaintiff was entitled to judgment on the pleadings, as every allegation of a pleading is to be taken as true, unless specifically traversed. (Civil Code, sections 95 and 126; Trustees Ky. F. O. S. v. Fleming, Ex'r, &c., 10 Bush, 238; Preston v. Roberts, &c., 12 Bush, 581.)
3. The rule that a man shall not take advantage of his own wrong applies in this case. (Bibb v. Bibb, &c., 17 B. M., 307; Brookover v. Hurst, 1 Met., 668; Martin v. Martin, &c., 5 Bush, 54.)
4. A party is estopped to deny any fact which, by his own deed, he has admitted. (Rau & Rieke v. Boyle & Boyle, 5 Bush, 262;

83	391
85	406
88	391
89	338
83	391
118	176

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Fitzhugh's Heirs v. Tyler, 9 B. Mon., 561; Breckinridge, &c., v. Ormsby, 1 J. J. Mar., 255; Lyne v. Bank of Ky., 5 J. J. Mar., 569.)

JAMES R. HEWLETT FOR APPELLEES.

1. A court of equity will not enforce a mortgage given without consideration, and for the purpose of defrauding the mortgageor's creditors. (Enders v. Williams, 1 Met., 348; 34 Am. Dec., 765, 767.)
2. As the note sued on was without consideration, the court properly refused to give judgment for the amount thereof. (Brookover v. Hurst, 1 Met., 668.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This action was instituted by the administrator of Wm. E. Jones against the appellee, J. J. Jenkins, in which a judgment is sought on a note executed by Jenkins to the intestate for \$1,138 on the 28th of August, 1869, and payable two days after date, and a mortgage having been executed to secure its payment on the real and personal estate of the obligor, the Chancellor is also asked to sell this mortgaged property in satisfaction of the debt.

The appellee Jenkins admitted the execution of the note, but pleaded a want of consideration; and further, that the note was executed and the mortgage given to prevent his creditors from making their debts.

The appellant took issue upon the defense presented, and alleged that the note was given for debts and money loaned the appellee by his intestate. An amended petition was then filed by the administrator, in which it is alleged that T. Y. Jenkins, Sarah E. Hobby, &c., appellees here, had, since the execution and recording of the mortgage, purchased the land of the mortgageor or were setting up some claim to it. These parties answered, admitting the purchase

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of the land, and alleging that they had paid for it a valuable consideration, and that the note and mortgage given to the appellant's intestate were for the sole purpose of enabling Jenkins' to defraud his creditors.

The testimony in the case conduces to establish the fraudulent intention of the parties to the note and mortgage, and that no consideration existed for the execution and delivery of either instrument.

The intestate was a man of but limited means, and in no condition to indulge the appellee, Jenkins, for nine or ten years in the payment of such a sum of money, and besides, to permit him, without complaint, so far as appears from this record, to convey the security given for the debt to others, and deliver to them the possession. Jones, the obligee in the note and appellant's intestate, lived until the year 1881 without any effort to coerce payment, and when he must have known that this land was sold, or the greater part of it, by Jenkins, and deeds made to the purchasers.

There is no attempt to show any indebtedness on the part of Jenkins to Jones, except on the sale of one crop of tobacco, and there is no proof that the value of this tobacco approximated even the amount of the note. It was not worth exceeding three hundred dollars. The parties were brothers-in-law, and the circumstances connected with the entire transaction leave but little doubt as to the origin of the claim sought to be enforced.

The transaction between Jenkins and Jones being actually fraudulent, the purchasers for value are not

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affected by either a constructive or actual notice of the mortgage.

The rule is that a voluntary conveyance is *prima facie* fraudulent as to a subsequent purchaser for value, and unless the purchaser has actual notice of the transfer or conveyance, his title is perfect, and in no manner affected by the fact that the voluntary conveyance is of record. Actual and not constructive notice must be brought home to the purchaser. This is not a mere voluntary conveyance, but a conveyance tainted with actual fraud, in which both the mortgageor and the mortgagee have participated, and the question of notice to a purchaser for value does not arise, as he holds the title in such a case, although he may have both constructive and actual notice of the conveyance. Such a conveyance is void as to the purchaser who pays his money for the land.

In the case of *Bibb v. Bibb*, 17 B. Monroe, 292, it was held, that where the conveyance was executed and based upon no other consideration than that of vesting the title in the grantee to defraud creditors, the grantor could not make such a defense against the grantee seeking to recover the land by reason of his title. In an executed conveyance, although fraudulent, the title as between the parties passes to the grantee, but in an executory agreement the fraud may be relied on to prevent its specific execution. So as between the appellee Jenkins and the intestate, the Chancellor would have declined to render a judgment of foreclosure if the mortgage can be regarded as passing the absolute title.

In the case of *Brookover v. Hurst*, 1 Met., 665, it

was held by this court that a mortgage being an executed conveyance, it transferred to the mortgagee the legal title, and that upon a breach of the condition the title became absolute at law. The ancient rule on the subject was, that when the condition was broken, the mortgagee had the right of entry, and could maintain his ejectment, but this doctrine has been greatly modified under our system. Until recently, this court made but a slight difference between a mortgage and an absolute conveyance upon the question of title, holding that the legal title passed to the mortgagee, with the equity in the mortgageor. The mortgageor is now the real owner of the estate mortgaged, whether you pursue him in a court of law or a court of equity, and the mortgagee holds the estate mortgaged as a security only for the debt. It is a mere lien of the creditor that can only be enforced in a court of equity; so there is now a manifest difference between an executed conveyance of realty and a mortgage given by the real owner to secure his indebtedness. In the latter case, the debtor may make defense to prevent a foreclosure upon the ground that the conveyance was made to defraud creditors, while no such defense would be allowed in an executed conveyance.

In the case of *Brookover v. Hurst*, above, the court held that so far as the contract was executory it could not be enforced, but intimated that the mortgage would be obligatory on the parties, because when the condition was broken the title was absolute. We think it plain that now, the equitable right of the mortgagee to foreclose will not be enter-

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tained by the Chancellor upon facts offered by the defense conducing to show that the sole purpose of the mortgage was to defraud others. It results, therefore, that the Chancellor properly adjudged that the appellant, the administrator, was not entitled to recover either against the obligor Jenkins or the purchasers of the land from him..

It is complained by the appellant that as administrator he was at least entitled to a judgment on the note if not allowed to enforce his lien.

The want of consideration is clearly shown, and we see no reason why the defense will not prevail as against any personal judgment in favor of the administrator; and besides, the land having been mortgaged with a fraudulent intent, the Chancellor will not only refuse to foreclose the mortgage, but will decline to aid the plaintiff in any way in his effort to make the fraud result to his own benefit.

The judgment below, for the reasons indicated, must be affirmed. (Nellis v. Clark; 20 Wend., 24; Wheeler vs. Russell, 17 Mass., 258; Miller v. Marckle, 21 Ill., 152.)

CASE 58—PETITION ORDINARY—NOVEMBER 19.

Hayden, &c., v. Ortkeiss' Adm'r.

APPEAL FROM NELSON CIRCUIT COURT.

1. **BILLS OF EXCEPTIONS.**—If further time be given to tender a bill of exceptions, and the absence of the judge who presided at the trial prevents it being signed by him within the allotted time, then it should, in all cases, be certified by by-standers, and not by a judge who did not hear the trial.

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2. **REVIVOR.**—The death of the appellee before the time allowed for filing a bill of exceptions will not prejudice the appellant, if his bill be tendered within the time allowed, although there may have been no revivor.

JOHN D. WICKLIFFE FOR APPELLANTS.

The bill of exceptions can not be certified by by-standers if the judge who presided at the trial also presided when the motion for a new trial was overruled, although he may be absent at the time fixed for filing the bill. In such a case, it is proper for the judge who may be presiding to spread the bill on the order-book. (13 Edward I, chapter 39; 1 Littell's Laws, 203; 1 Statute Laws, 246-7 (2 Littell's Laws, 31); 1 Statute Laws, 248 (2 Littell's Laws, 402); 3 Littell's Laws, 40; Code of 1851, section 379; Code of 1854, section 367; Code of 1877, section 337; Dils v. Brown, 2 Ky. Law Rep., 214; 3 Dana, 446; 12 B. M., 129; Hardin, 166.)

J. C. WICKLIFFE FOR APPELLEE.

At the time the so-called bill of exceptions was filed, the death of appellee had been suggested, and there had been no revivor against his representatives. The order filing the bill was, therefore, void. (Davis' Adm'r v. Goggin's Adm'r, 4 Ky. Law Rep., 728.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellant, R. B. Hayden, after his motion for a new trial had been overruled, obtained leave until and including the fourth day of the succeeding term of court to tender a bill of exceptions. The adverse party died before the beginning of the next term, and this was suggested on the second day of the term, and before any bill had been tendered. Upon the same day, however, the appellant tendered a bill and moved to have it signed and made part of the record. He also entered a motion to revive the action in the names of the widow and heirs of his deceased adversary. The regular judge, who had presided at the trial, and had refused to grant another, was not in attendance or holding the court; and the special presiding judge declined to make

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any order in the case because he was the administrator of the deceased. Upon the fourth day of the term another special judge was elected in this case, and the motion to sign and make the bill of exceptions a part of the record was renewed before him; but he declined to sign it, because the case had been tried before the regular judge, and simply ordered the bill to be entered upon the record book. Upon a subsequent day of the term the cause was, upon the petition of the widow and heirs of the deceased party, who had been the plaintiff, revived; and they then moved to set aside all the orders that had been made in the cause from the time when the plaintiff's death was suggested until the revivor of the action. This motion was overruled, and it is now insisted for the appellees that there is no bill of exceptions; that therefore the record does not exhibit the instructions that were given or refused or the evidence in the cause, and the judgment must be affirmed. The appellant, however, claims that he did all that was required of him, and that he ought not to be prejudiced or prevented from taking an appeal by the death of his adversary or the absence of the judge who tried the case.

The death of a party, which might occur upon the day before the last one given within which to tender a bill of exceptions, should not be allowed to prejudice the adverse party, provided he in fact tenders his bill within the time allowed, and thus does all that is required of him. It is true that there is but one party then in court; but wrong will be guarded against by the judge, whose duty it is to

see that a correct bill is signed and made a part of the record; or, in case another is presiding who can not act, by the course hereinafter indicated.

The object of the bill is to present to the appellate court a correct statement of the evidence and action of the lower court. Reason, therefore, as well as the policy of the law, dictates that it should be certified by the judge who presided at the trial, or by some one who heard it.

Subsection 5 of section 337 of the Civil Code provides: "If the judge who presided at the trial do not preside when a motion for a new trial is overruled, the bill of exceptions may be certified by by-standers, and be controverted and maintained, pursuant to the provisions of subsections 3 and 4 of this section."

If this section, when properly construed, does not provide for a case like the one now under consideration, and is to be limited, as the literal words seem to provide, to a case where the judge who presided at the trial does not act upon the motion for a new trial, then in case time is given until a subsequent term to present a bill of exceptions, and the judge who presided at the trial and overruled the motion for a new one is not present at the next term, the party is remediless. In our opinion the word "*is*," in the section *supra*, was intended as equivalent to the words "has been," and that if further time be given to tender the bill, and the absence of the judge who presided at the trial prevents it being signed by him within the allotted time, then it should be certified by by-standers,

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whether the motion for a new trial was overruled by the judge who presided at the trial, or has been by reason, for instance, of his death, overruled by a special judge subsequently presiding in the case.

Conceding, however, that there is a proper bill of exceptions in the record, yet the instructions given to the jury were as, if not more, favorable to the appellant than was proper.

They adopted the line from figure 2 to A in the Liver's plat, and which was fixed by the processioners, instead of that from 2 to 3, the latter evidently being the true line of the Myers patent, and limited the right of the plaintiff to recover to a possessory title based upon his alleged actual adverse possession of the land for fifteen years prior to the defendant's entry upon it; and if what purports to be a bill of exceptions could be considered, it appears that the testimony upon this question of fact was conflicting, and that the verdict ought not therefore to be disturbed.

Judgment affirmed.

83	400
87	106
83	400
99	243

CASE 59—PETITION EQUITY—NOVEMBER 24.

Hoffman v. Brungs, &c.

APPEAL FROM KENTON CIRCUIT COURT.

1. TO BRING WITHIN THE ACT OF 1856 A TRANSFER by a debtor to his creditor, it must appear that it was made in contemplation of insolvency, and with the design to prefer the transferee over other creditors.

Where an insolvent debtor executes a mortgage to one creditor in a sum sufficient to swallow up his entire estate, the fact that the

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mortgagee regarded the debtor as amply solvent, and that the debtor himself "expected to pull through," will not authorize the belief that insolvency was not contemplated, and that there was no design to prefer.

2. **CASE ADJUDGED.**—H. advanced money to B. & Co. with which to purchase tobacco, under an agreement that all the tobacco purchased by them during the year should be shipped to the tobacco warehouse of H. for sale on commission, and to indemnify him. After advances amounting to a large sum had been made, B. & Co., having become insolvent, executed to H. their note for the whole amount, and also a mortgage on all the tobacco in their warehouse to secure its payment. *Held*—That this mortgage was within the act of 1856, and operated as an assignment for the benefit of all the mortgageor's creditors. Had the tobacco been actually delivered to H. as a factor before other equities intervened, the case would be different, provided the money advanced was invested in this tobacco.
3. **COMMENCEMENT OF ACTION—WARNING ORDER.**—The taking of a warning order against a non-resident defendant is the beginning of the action as against him; no summons is necessary.
4. **WHILE A MORTGAGE ON A STOCK OF MERCHANDISE** may not be enforceable as to goods not in the store at the time of the mortgage, such a mortgage having been enforced by the lower court without defense, this court can not assume that the stock had been replenished, but must assume that the lien existed and was properly enforced.

HALLAM AND MYERS FOR APPELLANT.

Brief not in record.

O'HARA & BRYAN AND COLLINS & FENLEY FOR APPELLEES.

Brief not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This case is considered for the second time on the petition of appellant for a rehearing. The principal objection to the opinion is, that it overrules, in effect, the doctrine established in the case of *Brooks, Waterfield & Co. v. Staten's Adm'r*, 79 Ky., 174, and is a departure from the numerous opinions of this court, holding that, to bring the case of the debtor within the act of 1856, the transfer, in contemplation of

Hoffman v. Brungs, &c.

insolvency, must appear, and the design to prefer one creditor over another. Counsel asks if those uniform decisions are to be overruled, and suggests that the question is of too grave a character to be overlooked.

We will try to allay the fears of counsel by demonstrating that there is no analogy between the case reported in 79 Kentucky and the one being considered; and further, that *the culminating wrong* complained of by counsel in this case in taking from his client \$2,237.76, *actually advanced contemporaneously* with the security taken, constituting the act of insolvency, exists only in the imagination of counsel, unsupported by any testimony, a fact that a less discriminating mind than his own would readily have discovered by the most casual inspection of the record.

It is gravely urged that the transaction between the appellant (his client) and his debtors, determined by this court and the court below to be constructively fraudulent, was made upon the faith of Brooks, Waterfield & Co. v. Staten's Adm'r, above, and hence the necessity of adhering to the doctrine of that case or overruling it in express terms.

The client may have failed to draw the distinction between the two cases, still the attorney is in no wise responsible for his client's misconception of the law.

John Brungs, William Brungs and Joseph Brungs were partners, doing business in the firm name of John Brungs & Bros. They were merchants, engaged in the sale of dry goods by retail, purchasing and

selling lumber, and also engaged in the purchase and sale of tobacco, and were the owners or in the possession of two large tobacco warehouses in the county of Kenton, where their firm business was transacted. The appellant was the owner of the Bodman Tobacco Warehouse in the city of Cincinnati, and had loaned or made advances to these merchants in Kenton county of large sums of money, that amounted, on the 31st of May, 1882, to the sum of fourteen thousand dollars, for which a note was on that day executed, and at the same time, as a security for the money, a mortgage was executed by the firm to the appellant on all the leaf tobacco of the firm in their warehouse at Morning View, in Kenton county, Ky., and on all the tobacco in their warehouse on their farm in the same county. This mortgage was properly executed and admitted to record, and is the evidence of the act of insolvency resulting in the judgment below denying to the appellant any priority over the appellees, who are also firm creditors.

On the 22d of June, 1882, the firm executed to the appellant their note for \$1,500, and to secure the payment gave to appellant a mortgage on all their first and second class lumber in their lumber yard at Morning View. On the same day the firm executed another note for \$3,000 to the appellant, and gave a mortgage on two tracts of land in Kenton county to secure its payment.

No money was loaned on either of these notes, the \$1,500 and \$3,000, nor any consideration passed, but it appears they were credited, or to be credited, on the note for \$14,000, secured by the mortgage on

Hoffman v. Brungs, &c.

the tobacco. The appellant brought his action to foreclose the mortgages, and obtained an attachment upon the ground that the mortgageors had not sufficient property subject to execution, and he was in danger of losing his debt, and the further ground that the defendants (his debtors) were about to make a fraudulent disposition of the mortgaged property. By his petition he credits the note of \$14,000 with the two notes of \$1,500 and \$3,000, executed on the 22d of June, leaving those notes in full force so as to enforce the mortgage on the lumber and the land given to secure their payment. By executing these notes and entering them as a credit on the \$14,000 note that was justly owing, and obtaining the additional mortgages, he spreads the \$14,000 note over the tobacco, lumber and land.

A part of these appellees, being creditors of the firm, were made by their petition parties to the action, and attacked the transaction of the 31st of May, 1882, as being constructively fraudulent. Process was served on the debtors composing the firm within the six months, and Hoffman, being a non-resident, a warning order was entered as to him, and after the six months expired he appeared in the action.

It is now insisted, that because no summons issued against the non-resident Hoffman, the action was not commenced within the six months. The debtors, whose act in executing the mortgage was constructively fraudulent as to their creditors, were all served with process, or the summons issued within the six months, and in proceeding against the

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non-resident Hoffman, the only summons known to the law by which he could have been brought before the court when no actual service could he had, was adopted: that is, the warning order. Any other process would have been futile, and this court did not decide that the appearance after the six months cured the defective process, nor was the case of Cecil v. Sowards, 10 Bush, 96, ignored.

In that case it was held that the amended petitions filed were new and distinct causes of action upon which process must issue, and the charge of insolvency, etc., having been made for the first time in the amendments, and process having been issued for the first time nine months after the filing, it was too late to make the question. This court said in the former opinion, that while no personal judgment could have been rendered against Hoffman without an appearance, he did appear, and that removes any obstacle in the way of a judgment—not a judgment determining the transfer by the debtor to be within the act of 1856, but a personal judgment, the court having already adjudged that the issuing of the summons against the debtors, and the warning order, gave the court jurisdiction, and the statute requiring the filing within six months was no obstacle in the way of recovery.

It is further argued that it is indispensable to show, first, that the transfer or mortgage was made in contemplation of insolvency, and second, with the design to prefer; but that this court *has decided*, in the opinion assailed, that no such contemplation nor any such design was required.

Hoffman v. Brungs, &c.

The appellant, Hoffman, when examined as a witness, states that, up to the time of suing out his attachment in this case, he considered the firm perfectly solvent, and worth fully ten thousand dollars over and above their liabilities; yet he takes the precaution to cause the firm to execute to him three mortgages, the first on the tobacco, the second on the lumber, and the third on the realty, and the last two mortgages to secure notes without any other consideration than to be credited on the \$14,000 note, so as the amount of that note might be secured by the entire property of the firm.

The individual members of the firm owned no property, and their assets were worth \$14,000, and their liabilities amounted to \$21,000 at the date of the mortgage. They were believed then by the business community to be in failing circumstances; and because John Brungs, one of the firm, testifies that he had no intention of making an assignment, but expected to pull out, we are asked to adjudge that the mortgage of the 31st of May, 1882, was not made in contemplation of insolvency by the firm, and with the design to prefer the appellant. No stronger case could be made out for enforcing the equity of the statute than appears from this record. The debtor is not only in failing circumstances, but actually insolvent, and executed a mortgage to one creditor in a sum sufficient to swallow up his entire estate; but as the creditor regarded him as worth fully ten thousand dollars over and above his indebtedness, and the debtor states that he *expected to pull through*, therefore this court must believe

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that insolvency was not contemplated, and the intention to prefer absent from the mind of the debtor. The acts of the debtor and his failing condition demonstrate what was contemplated by him at the time, and these mortgages, or the one of May 31, 1882, shows the intention to prefer. He may swear that such was not his purpose, but in doing so he makes a statement contrary to the necessary results of his own act. The mortgage was made in contemplation of insolvency, and with the design to prefer. Any other application of the facts involved here would defeat the legislative intent, and enable the debtor to prefer, regardless of the statute; nor is there any reported case in conflict with the views here presented. The design to prefer, in contemplation of insolvency, must be made to appear, and both essentials are clearly established in this case.

It is again said that the court has taken from Hoffman, appellant, \$2,033.76, actually advanced contemporaneously with his security. The facts of the record present no such case. It is an assertion of counsel no doubt unintentionally made, but without the semblance of proof to support it.

When the appellant's mortgage was assailed by the other creditors, the former made this defense: That he was engaged in the business of receiving and selling leaf tobacco on commission, and in the usual course of business had made advances to the firm of John Brungs & Bros., and contemplated making other advances to them to enable them to purchase tobacco for shipment to the warehouse

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of defendant, to be sold on commission for their account; that in consideration thereof, the firm contracted to and with the defendant that they would deliver to the defendant all leaf tobacco that might come to their ownership during the year 1882; and that, prior to the attachment herein, the firm did deliver to him, under said contract, all the tobacco mentioned in the petition, and thereupon the defendant's lien as factor became complete.

In *Brooks, Waterfield & Co. v. Staten's Adm'r*, 79 Ky., the firm of B., W. & Co. made advancements of money to W. upon a contract that he would buy tobacco, prize and ship it to B., W. & Co., who were to sell on commission, and out of the proceeds indemnify themselves for advances. The firm had been indemnified in full except about \$1,200, and the debtor having tobacco purchased with the firm's money, or for the firm, in a warehouse in Bracken county, made an actual delivery of the tobacco to the firm in discharge of the advances made. It was held that the appellants, having reduced the tobacco to possession before other equities intervened, their lien as factors was superior to an attaching creditor, and the transfer was not within the act of 1856. The doctrine of that case is now the settled law of the land, and was so regarded when the opinion in the present case was delivered.

We have been unable to see in what manner the principle involved and settled in that case is to affect the present appellant. If the moneys advanced by the appellant were invested in this tobacco, and as a factor it had been delivered to him to in-

Hoffman v. Brungs, &c.

demnify him for the moneys advanced, it would, according to the doctrine of *Brooks, Waterfield & Co. v. Staten's Adm'r*, settle this question.

Here there is no pretense that the possession of the tobacco was ever delivered to the appellant, and no proof that the tobacco was purchased even with the moneys advanced, but it is insisted that an agreement, when advancing the money, that all the tobacco purchased by the firm of *Brungs & Bros.*, during the year 1882, should be shipped to appellant's tobacco warehouse for sale on commission, and to indemnify appellant in the loan, gave to the latter a lien over all creditors, although no part of it was ever in their possession as factors, or under their control in any way. That this firm engaged in the business of selling lumber, in the sale of dry goods, and in buying tobacco, had, by reason of their agreement, in consideration of advances made, to ship all the tobacco purchased during one year to appellant's house, a lien superior to all others. When their mortgages and attachment fail to secure them as against others creditors, an effort is made to fall back on the doctrine established by the case in 79th Ky., where the money of the factor purchased the tobacco, and where he had obtained the actual possession before the attaching creditors levied. The distinction between the cases is so apparent that it is useless to discuss the question further.

Again, it is argued that as the mortgage to *Mrs. Fry* embraced the goods in a retail store, in filing her petition she should have alleged that the stock had not been replenished. In other words,

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that the court would take judicial notice of the fact that the habit of merchants was to replenish their stock, and an averment that the goods sought to be sold were the same goods that were in the store when the mortgage was executed is indispensable to the relief sought. No defense whatever was made, and while a shifting mortgage may not be good as to chattels not in the store at the time, we must assume in this case that the lien existed, and was properly enforced.

Judgment affirmed.

CASE 60—PETITION ORDINARY—DECEMBER 8.

Greer v. City of Covington.

APPEAL FROM KENTON CIRCUIT COURT.

1. THE LEGISLATURE MAY AUTHORIZE A CITY TO COLLECT TAXES BY SUIT; and where this remedy is given, it will not be held to exclude a summary mode of collection already provided by statute nor will it be limited to cases in which the summary mode may have proved ineffectual, unless the statute so provides.
2. A PERSONAL JUDGMENT BEARING INTEREST from its date may be rendered against the tax-payer, where a suit for the collection of taxes, in addition to the summary mode of collection by distraint, is authorized by statute.
3. PLEADING WANT OF INFORMATION.—A plea by the defendant that "he has no information sufficient to form a belief" as to whether certain ordinances were ever published "*as required by law*" is but a statement of his want of information as to the law, and is not good.
4. AMENDMENT OF PLEADINGS.—The only limitation upon the discretion of the court in allowing amended pleadings to be filed is that they must be in furtherance of justice, and must not change substantially the claim or defense.

83	410
112	225
83	410
112	225
112	231

83	410
112	522

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A demurrer to the petition being sustained, the court did not abuse its discretion in allowing an amended petition to be filed, although an answer and reply had been filed.

5. **OVERRULED CASE.**—The manuscript opinion, in the case of *City of Covington v. People's Building Association*, September 30, 1882, in so far as it is in conflict with this, is overruled.

A. G. SIMRALL FOR APPELLANT.

M'KEE AND FINNELL FOR APPELLEE.

Record and briefs misplaced.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The principal question presented by this appeal is, whether the appellee, the City of Covington, can maintain a suit against the appellant, A. L. Greer, for the municipal taxes of several years owing by him, and which annually amounted to over one hundred dollars, and had been due for more than six months before the bringing of the action.

The city charter of March 2, 1850, provides, that if a person's taxes are not paid by a certain time, that the city treasurer shall indorse the tax bills "delinquent," and return them to the city clerk, who shall add thereto fifteen *per centum*, and then deliver them to the city collector, who may at once proceed to collect them by distraint.

The seventh section of an act of the Legislature of March 6, 1876 (Acts 1876, volume 2, page 32), amendatory of the charter, provides:

"Whenever the annual or revenue taxes assessed against any person, or against joint owners, or any corporation or partnership, shall amount to one hundred dollars or over, and shall have been due and unpaid for more than six months, said city council may cause the same to be sued for in the name of

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the city of Covington, in the circuit court, and this shall apply to taxes now due as well as those that may hereafter become due, and whether said amount shall accrue from one assessment or successive assessments. Said city shall have the power in such cases to sue for and collect its taxes and enforce its lien."

It is urged that the lower court should not have entertained jurisdiction of the cause. It is a well-settled general principle, that when a statute gives a right, and also provides a specific and adequate remedy for its enforcement, and it appears with reasonable certainty that the Legislature intended it as the only one, that then a resort to any other mode of enforcing the right is forbidden by implication.

Cases may, perhaps, arise of such a peculiar character, and in which the prescribed remedy may prove ineffectual, that a resort may be had to judicial proceedings; but if the necessity does not exist, then the particular remedy furnished by the statute must be held to exclude all others; and this is upon the ground that such was the legislative intent.

If a municipal corporation has been given a speedy and adequate remedy for the collection of its taxes (as did the charter in this instance, by distraint), there is no reason or necessity, even if it were permissible, to imply the existence of any other remedy, or to allow it to sue for them.

We are aware that it has been held by some courts that a tax, when legally assessed, creates an obligation upon which the municipality may

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sue *in assumpsit*; and may do so, although a summary mode for its collection may have been provided by statute.

It is unnecessary, however, to consider the correctness of this position, because in this instance the Legislature has not only provided a summary way, but has also by subsequent legislation expressly authorized its recovery by suit; and without any conditions, save that the annual tax due must amount to one hundred dollars or over, and have been due for over six months. It has not seen fit to provide that the latter remedy can be adopted only when the other has proven futile.

The assessment or collection of taxes is not an inherent power of the judiciary. It is not a tax gatherer. Both public policy and private right so dictate. If the means provided by the law-making power are insufficient, then resort must be had to amended legislation.

This seems to be the rule as declared by the Supreme Court of the United States, and adopted by this court.

It is not our province, however, to discuss the policy of legislation; and we also recognize the rule that the judiciary may be called upon to act in a judicial way in the collection of taxes, when the law so provides.

Says Mr. Cooley:

“What method shall be devised for the collection of a tax the Legislature must determine, subject only to such rules, limitations, and restraints as the Constitution of the State may have imposed;” and

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he enumerates, among other methods, "suit at law; * * imposition of penalties for non-payment." (Cooley's Constitutional Limitations, page 645.)

But a question similar to this, but relating to the charter and rights of another municipality, has already been before this court. Prior to and on March 3, 1876, the charter of the city of Louisville provided for distraint for taxes due to it; but the Legislature, by the sixth section of an act of that date, and which is substantially equivalent to the section *supra* of the act relating to the appellee, gave to the city of Louisville the right to sue for unpaid taxes; and its constitutionality was affirmed in the case of Ormsby, &c., v. City of Louisville, 79 Ky., 197.

The act of March 6, 1876, does not render nugatory the collecting power or mode which its charter had already conferred upon the appellee. The Legislature has seen fit to also give it, as an additional remedy, the right to sue for unpaid taxes without limiting it to cases where the mode already in existence might prove ineffectual. The two laws are *in pari materia*, and are to be considered together, as if they were one law.

The collection of taxes, when made in the usual mode, is an executive duty; but a court may be empowered to do in a judicial way what the executive branch of the government might have done. It matters not whether a tax be a debt or a duty, it is an obligation of the individual to the government, and a judgment, to be enforced by the executive, may be rendered in favor of the government as well as an individual, because it is equally a judicial act.

It is urged that a *personal* judgment, bearing *interest* from its date, was improperly rendered, and that if this were allowable, that then its enforcement by execution would reduce the right of the tax-payer to redeem his property from three years, as given by the charter, to the one year allowed by the general law for the redemption of land when sold under execution, and that as the judgment did not fix the amount of taxes due upon each piece of property, and subject it separately to them, but aggregated the entire taxes owing by the appellant, that, therefore, the defendant, in case of a sale, will be at a loss to know how to redeem.

We have already said that the suit was authorized, and a fair construction of the act authorized the court to render a personal judgment, which, by the general law, bears interest from its rendition. It is said that the only purpose of authorizing suit was to permit the enforcement of the tax lien, and that this is all that the act authorizes. If this be so, then it was useless, because the already existing law permitted this to be done summarily by distraint, and it is not to be presumed that the additional legislation was in vain. The question is not now presented whether, in case of a sale under execution, the tax-payer would be entitled to one or three years within which to redeem; but whether it be one or the other, it is a right which the Legislature may regulate as it pleases; and by section 7, article 12, chapter 38, of the General Statutes, a defendant has a right to direct the order of sale under execution of his several lots of real estate, and we, therefore,

fail to see in what way the appellant's right to redeem would be prejudiced.

The lower court did not err in striking out the amended answer. The city charter did not require the city council to designate each year what property should be assessed for taxation; and the statement that the defendant "has no information sufficient to found a belief upon that any of the ordinances mentioned in plaintiff's amended petition were ever published *as required by law*," is but a statement of the party's want of information of the law.

The third paragraph of it is but the statement of a legal conclusion, and the city charter did not require the council to approve the assessment of property.

The counsel for the appellant erroneously supposes that the lower court struck out both the answer and amended answer. This it did not do, but properly, as we think, sustained the demurrer to the fifth, sixth, eighth, ninth, tenth, fifteenth and seventeenth paragraphs of the original answer.

The demurrer to the petition having been sustained, and leave given to amend, the appellee, at the same term of the court, was allowed to file an amended petition, although an answer and reply had then been filed; and of this the appellant complains. The Legislature has wisely given to the trial court a broad discretion as to permitting amendments in order that it may arrive at the justice of a cause and act upon the merits.

The only limitation upon this discretion is, that the amendment must be in furtherance of justice,

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and must not change substantially the claim or defense. (Civil Code, section 134.)

It is impossible to establish a rule as to what shall constitute a sound or legal discretion in the matter, as we are now asked to do, because the varying circumstances of each case necessarily enter into the question whenever it arises.

The justice of the judgment below is manifest; and as we perceive no error requiring its reversal, it is affirmed.

The manuscript opinion of this court in the case of the City of Covington v. The People's Building Association, September 30, 1882, so far as it is in conflict herewith, is overruled.

CASE 61—PETITION EQUITY—DECEMBER 8.

Brown v. Ferrell, &c.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

1. **VENDOR'S LIEN.**—As between vendor and vendee, a lien for purchase money exists, although it does not appear from the deed that any part of the purchase money remains unpaid.
2. **REMAINDERMEN OCCUPY THE POSITION OF VENDEES**, and hold subject to the vendor's lien, where the deed is to the vendee for life, remainder to his heirs, and both the life-tenant and the remaindermen then in existence being parties to the action to enforce the lien, the purchaser at the decretal sale acquires an absolute title, free from any claim of after-born children of the life tenant.
3. **LIFE ESTATE.**—A conveyance to F., to have and to hold unto said F. "during his life, and at his death to his heirs by blood," creates in F. an estate for life, remainder to his heirs.

J. I. LANDES FOR APPELLANT.

No lien exists in favor of the vendors as against the infant remainderman, because the deed shows on its face that the purchase money was paid. (General Statutes, chapter 63, article 1, section 24.)

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83	417
87	30
83	417
134	228

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G. A. CHAMPLIN FOR APPELLEES.

The infant defendant's interest accrued long after the purchase, and subject to the payment of the purchase money, which the proof shows has never been paid. Appellant, therefore, acquired a perfect title by his purchase.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Section 24, article 1 of chapter 63, General Statutes, provides, "that when any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against *bona fide* creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid."

The conveyance in this case by William Ferrell to his son John contains this provision: to have and to hold "unto said John Ferrell during life, and at his death to his heirs by blood."

At the time of the conveyance John, the son, had no children, but subsequently married, and has one child, an infant, who is a defendant to the action and a party to this appeal.

The purpose of this proceeding by the father was to subject the land sold the son to the payment of the purchase money; and regarding the infant as being vested with the title in remainder, both the vendee, John Ferrell, and his infant child, were made defendants.

It is plain that the notes for which the land was sold were executed for the purchase money, and although the recital in the deed acknowledges payment in full, no part of the purchase money was, in fact, paid. The parties to the conveyance supposed that the recital in the notes that they were executed

for the land gave to the vendor a lien for the purchase money.

In order to retain a lien against *bona fide* creditors and purchasers, it must appear from the conveyance what part of the consideration remains unpaid; but as between the parties to the instrument, the vendor and the vendee, the lien exists for the purchase money whether mentioned in the deed or not, and, therefore, the vendor in this case had the right to subject the entire estate to the payment of the purchase money.

The infant child had a vested interest in the land, but still those in remainder occupied the position of purchasers as well as the life tenant, and held the land subject to the vendor's lien.

Section 10, article 1 of chapter 63, General Statutes, provides: "If any estate shall be given by deed or will to any person for his life, and after his death to his heirs, or the heirs of his body, or his issue or descendants, the same shall be construed to be an estate for life only in such person, and a remainder in fee-simple in his heirs, or the heirs of his body, or his issue or descendants."

This conveyance, by reason of the statute, under which it must be construed, gives to John an estate for life, remainder to his heirs.

The child, who is now the remainderman, and who would take the estate in the event the father should die, being before the court when the judgment was rendered directing the land sold for the purchase money, the purchaser at the decretal sale became vested with the absolute title.

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Neither after-born children, nor the heirs of John, the grantee, can assert any "claim" after John's death, because all who had any interest either for life or in remainder were before the court when the judgment of sale was entered. To hold differently would preclude the vendor from enforcing his lien, or cause the judgment or proceedings to be opened by those who might possibly have an interest in the land if the life tenant had never been divested of title.

The proceedings below were had in good faith, and whether so or not, the court below having complete jurisdiction over the subject-matter, as well as all the parties in interest, the purchaser's title is perfect, and the judgment below requiring him to take the land must be affirmed.

CASE 62—PETITION EQUITY—DECEMBER 5.

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APPEAL FROM KENTON CIRCUIT COURT.

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1. A CITY ORDINANCE MAY BE IMPEACHED FOR FRAUD, but the mere fact that an ordinance, general in its application, injures in a peculiar way a particular individual, will not authorize the courts to presume that it was enacted for the purpose of annoying him, and depriving him of his rights, and for that reason to declare it void.
2. INJUNCTION.—Numerous warrants having been issued against an individual, charging him with the violation of a city ordinance prescribing a penalty for each twenty-four hours any person shall hold exclusive possession of any of the streets, commons, etc., belonging to the city, he filed his petition, alleging title in himself to the property which he is charged with holding, and asking an

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injunction restraining the city from prosecuting him. *Held*—That he is entitled to an injunction restraining the prosecutions until the right of property as between him and the city can be determined. The amount of the fine not being sufficient to authorize an appeal, an injunction is the only remedy.

3. A WRIT OF PROHIBITION is the remedy provided by appellee's charter for testing the validity of an ordinance; but the ordinance attacked in this case being valid, that writ is not the proper remedy for determining the right of property as between the citizen and the city.

COLLINS AND FENLEY FOR APPELLANT.

1. The court had jurisdiction to determine the validity of the ordinance by writ of prohibition. (Acts of 1849-'50, Vol. 1, page 238; Talbot v. Dent, 9 B. M., 525.)
2. The ordinance is invalid *per se*, because it does not contemplate a mere temporary obstruction of the streets, but makes it a penal offense for any one to hold the *exclusive possession* of the streets, etc. (Dudley v. Trustees of Frankfort, 12 B. M., 614.)
3. Injunction will lie to prevent the enforcement of an ordinance valid on its face, but invalid by reason of extraneous circumstances. (Ewing v. City of St. Louis, 5 Wall., 413; Brown v. Catlettsburg, 11 Bush, 435; Dillon on Municipal Corporations, section 611; Trustees of Louisville v. Gray, 1 Littell, 147.)
4. The ordinance is invalid by reason of the motives and circumstances under which it was enacted, and should be so declared by the court. (Dillon on Municipal Corporations, section 311; The State v. Cincinnati Gas Co., 18 Ohio St., 262.)

W. K. BENTON FOR APPELLEES.

1. The council had authority to pass the ordinance complained of. (1 Dillon on Municipal Corporations, section 245.)
2. The ground in controversy is a public space over which the city has exclusive control, with authority to prevent any one else from taking exclusive possession of it. (City of Covington v. McNickle's Heirs, 18 B. M., 281.)
3. The ordinance complained of is general in its character, and the court will not inquire into the motives of the members of the council in passing it. (1 Dillon on Municipal Corporations, section 248.)
4. The only purpose this action can serve, or was intended to serve, is to test the validity of the ordinance. Appellant does not ask for an injunction.

SAME COUNSEL IN PETITION FOR REHEARING.

1. No injunction was asked and none should be granted. (Civil Code, sections 90 and 276.)

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2. The mayor's court alone has jurisdiction to grant an injunction to stay proceedings on the judgment rendered in that court. (*Neeters v. Clement*, 12 Bush, 360; *Davis v. Davis*, 10 Bush, 276.)
3. Appellant neither alleges nor proves title or right of possession in himself, and therefore no injunction should be granted. (*Trustees of Louisville v. Gray*, 1 Litt., 146.)
4. Municipal corporations can not dispose of property of a public nature in violation of the trusts upon which it is held. (*Dillon on Municipal Corporations*, section 445, and authorities cited; *City of Covington v. McNickle's Heirs*, 18 B. M., 281.)
5. As to the cases in which judgments will be enjoined. (*High on Injunctions*, sections 46, 96 and 130; *Dedman v. Chiles*, 3 Mon., 426; *Brown, &c., v. Trustees of Catlettsburg*, 11 Bush, 439; *Ewing v. City of St. Louis*, 5 Wall., 413.)
6. If a party has a good defense at law to the whole or part of the demand and fails to present it, or it is disallowed by the verdict, chancery can not relieve him. (*Talbot v. Banks*, 2 J. J. M., 550; *Mershon v. Bank of Commonwealth*, 6 J. J. M., 440; *Harrison v. Lee*, 7 J. J. M., 172; *Walker v. Ogden*, 1 Dana, 253.)
7. The judgment of a court of limited jurisdiction, like the mayor's court, while acting within its jurisdiction, is entitled to the same respect as a decree of the Chancellor himself.

W. A. BYRNE ON SAME SIDE.

1. This is a suit to test the validity of an ordinance, and is, therefore, unlike the cases of *Dudley v. Trustees of Frankfort*, 12 B. M., 614, and *Trustees of Louisville v. Gray*, 1 Litt., 147, which were virtually suits to quiet title.
2. Appellant fails to show title or right of possession in himself. He claims under a lease from the city; but a city can not agree to part with any of her property in public use without special legislative power. (*Kennedy's Heirs v. Covington*, 8 Dana, 50; *Kennedy v. City of Covington*, 17 B. M., 588; 8 B. M., 258; *Owens v. Roberts*, 6 Bush, 609; *Covington Street Railway Co. v. City of Covington*, 9 Bush, 127; 8 Bush, 421; 3 B. M., 440.)
3. The ordinance is valid. It does not impose a penalty upon a citizen for holding his own property, but for holding the property of the city; and if appellant has a remedy, it is by a proceeding to quiet his title.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The city council of Covington having as a legislative body the complete control of the streets, lanes, alleys, wharves, landings, etc., within the

corporate limits, with the right to pass such ordinances and by-laws as may be necessary for the better government of the city, and to legislate on all subjects that the good government of the city may require, and affix penalties for the violation of its ordinances not exceeding fifty dollars, on the eighth of February, 1883, enacted an ordinance declaring "it unlawful for any person, unless by ordinance, resolution, or written authority of the council, or under the laws of Kentucky, to hold the exclusive possession of any of the streets, lanes, alleys, commons, spaces, squares, wharves, or landings belonging to the city of Covington, or any part thereof."

The penalty for a violation of the ordinance is the imposition of a fine in the mayor's court of fifteen dollars for each twenty-four hours the person charged may be found guilty of a violation of the ordinance, and the costs of proceeding, etc.

In a few days after the passage of this ordinance a warrant was issued in the name of the city against the appellant, charging him with violating its provisions. The case was heard in the mayor's court, and a fine imposed on the appellant of fifteen dollars, from which an appeal was taken to the quarterly court and dismissed for want of jurisdiction. Another warrant was then issued for a further violation of the ordinance by the appellant, and soon after as many as twelve or fifteen complaints entered against him by the city, involving his disregard of the ordinance, and asking for a summons against him.

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The appellant then filed his petition in the Kenton Circuit Court under section 1, article 9, of the city charter, for the purpose of testing the validity of the ordinance. By a provision of the city charter the *validity of an ordinance may be determined by a writ of prohibition* from the circuit court, or by the court having jurisdiction over said city, with the right of either party to prosecute an appeal, and, therefore, the jurisdiction is conferred by the charter, and the mayor may be prohibited from imposing the fine or proceeding under the ordinance until the ordinance is pronounced valid by the court from which the writ of prohibition comes.

Under this writ of prohibition, which seems to be the remedy provided by the charter where the validity of the ordinance is called in question, the court below was asked not only to determine the right of the mayor to impose the fine, but also to determine the right of property between the city and the appellant, although the ordinance should be adjudged valid.

This position is sought to be maintained on the ground that the ordinance was passed with a view to harass and annoy the appellant with warrants for the purpose of imposing the penalties for violating the ordinance, from which there was no appeal, until the appellant would be driven to abandon his right of property as against the city. It is alleged in his petition that the ordinance was enacted for the sole purpose of depriving appellant of his rights; that he is a resident and coal dealer in the city of Cov-

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ington, and that since 1874 he has used the bank of the river between Scott and Madison streets for the purpose of mooring his boats, floats, etc., from which he delivered his coal to the citizens of Covington; that the space between the two streets, from Front street to low water-mark in the river, was the subject of an action of ejectment by the city of Covington against McNickle's heirs, and that by the judgment in that case, rendered in 1871, the defendants in the action were given the possession and use of the property for the period of twenty-five years, provided they kept their rolling-mill thereon; that the heirs of McNickle leased this property and rolling-mill to Kyle, and in 1874 the appellant entered under Kyle, by which he was to have the right to use the river bank and to furnish coal to the mill.

It is further alleged that the city has never established a wharf, or provided a landing of any kind at this point, nor graded, paved, macadamized or furnished any means of mooring crafts, or of transporting their contents from there to any part of the city; that this property is only a common, and not used by himself exclusively, nor the right denied by him to others; that the city of Covington had leased the ground to Waterman & Woods, and agreed to place them in possession, and in the refusal to surrender possession by appellant originated the ordinance under which these fines are being imposed; that the property being a mere common, and not opened or used as a wharf or street, the city is enforcing this penal ordinance against appellant that its lessees may have the exclusive use of the prop-

erty. The warrants were issued for violating the ordinance in holding and exercising the exclusive use of the landing.

We perceive no objection to the ordinance under which the penalties in this case have been imposed. The right of the council to pass such an ordinance is not questioned by counsel for the appellant, and as it is universal in its application, affecting all alike living within the corporate boundary, it is not to be presumed that the only motive influencing the members of the city council to pass the ordinance was to annoy the appellant, and thereby deprive him of the use of the river bank.

There is nothing unreasonable in any feature of this law of the city, and no provision of it in violation of the city charter or the organic law of the State. It is to punish those who undertake to hold the exclusive use of the wharves, landings, streets, commons, etc., over which the city authorities have control, and to adjudge such an ordinance invalid would in effect take from the city legislature the power of controlling the use of its streets and public thoroughfares, and of punishing those who assume to use or control them without right.

Although the council in this case have been charged with fraud in enacting the ordinance, and we see no reason why the validity of an ordinance may not be assailed on the ground of fraud, still there are no facts in this record conducing to establish such a charge, nor would the court below have been authorized on the hearing of the writ of

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prohibition to listen to extrinsic evidence or facts alone applicable to the appellant for the purpose of determining an ordinance invalid as to him, but still valid as to all other citizens of the corporation.

The ordinance can not be determined invalid upon testimony showing that it is oppressive, or works a hardship to the person who has obtained the writ. The validity of the law or ordinance is in such a case alone the subject of inquiry. Had the city council the right to pass such an ordinance is the question to be determined, and no other.

That it may affect injuriously in some way one or more citizens who are complaining, does not make such an ordinance invalid, and while the act of a municipal corporation in the form of an ordinance may be impeached for fraud, says Mr. Dillon, in his work on Municipal Corporations, section 230, still there is nothing in this case, conceding the allegations of the petitioner to be true, that would authorize the court to presume the existence of a fraudulent purpose by the council in the passage of the ordinance; and to direct such an inquiry as to an ordinance clearly within the exercise of the corporate power and general in its character, would conduce to make legislation for the public good subordinate to individual interests.

The ordinance being valid, the writ of prohibition was not the proper remedy.

The appellant filed an amended petition, asking for an injunction restraining the city from prose-

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cuting the penal actions against him on the motion for the writ of prohibition, and also for an injunction. Upon the facts alleged the appellee, the city, appeared, and filing its demurrer, that was sustained, the court dismissed the petition, the appellant declining to amend.

The facts stated entitled the appellant to an injunction restraining the city from proceeding under its warrants until the controversy as to the use and possession of the property in question could be determined. Here was a controversy between the city and the appellant as to the use of the river bank as a harbor for his coal-boats in common with others. There was no wharf or city landing at this point—no street or any way belonging to the city obstructed, but the use in common with those who had coal and flat-boats on the river by using the shore as a place of fastening their boats, and of loading and unloading them when they saw proper.

No right of the city had been invaded by the appellant; but, on the contrary, the latter had used this part of the river bank as a matter of right. The judgment against the city in January, 1871, gave to the heirs of McNickle the possession and use of the premises for twenty-five years, and the appellant entered under the claim of McNickle's heirs in 1874.

The facts alleged in the petition are all admitted by the demurrer, and present a case where the city must adopt a civil remedy for relief if the facts alleged are not true, or litigate the right of the

appellant to the use of the property in the present action.

Fines and penalties can not be imposed against one who is rightfully in possession under the ordinance in question. It is intended to punish the trespasser, or those who, without right, are appropriating the property of the city to their own use, but can not be enforced against one who has the right to the use. The decision upon the warrant in the mayor's court does not determine this right; but if the facts alleged are true, the appellant is being punished by fine for exercising a right of which he can not be deprived without due process of law, and which he was exercising at the time the ordinance was passed. His ordinary remedy against the city for the wrong complained of would not stay proceedings upon the multiplied warrants against him, and in such a state of case we see no reason why a court of equity should not entertain jurisdiction, and stay all proceedings on the warrants until the matters alleged in the petition are heard and determined.

The aid of a court of equity cannot be invoked so as to interfere with proceedings of subordinate tribunals, unless to prevent irreparable injury or a multiplicity of suits. (*Ewing v. City of St. Louis*, 5 Wallace, 413; *The Mayor of Brooklyn v. Meserole*, 26 Wend., 132.)

The ordinance passed by the city is not void, but in accordance with law, and without any discrimination in its provisions as between the citizens of Covington, and the real ground for going into a court

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of equity is the illegal use made of this ordinance against a party who is without remedy at law, and who must be compelled to surrender his right to the use, title and possession of property in order to avoid the imposition of penalties upon him that, when enforced, must work irreparable injury.

It can not well be said that the city or its authorized agents are trespassers when the proceeding against the appellant is by warrant for a violation of the ordinance, and the judgment rendered by a court having jurisdiction over the subject-matter and the parties.

In the case of the Trustees of Louisville v. Gray, reported in 1 Littell, 147, Gray attempted to build a warehouse upon ground to which he claimed title, and the city authorities, claiming that the wall of the building was on a street of the city, proceeded to enforce the penalty of four dollars and costs against Gray for the obstruction. Gray obtained an injunction, that was perpetuated, upon the ground that he and not the city was vested with the title, and this court affirmed the judgment, holding that a court of equity could entertain the jurisdiction for the purpose of quieting the title.

In this case no action at law can be maintained for an entry on appellant's possession, for none has been made. He has no appeal from the judgment of the municipal court enforcing the ordinance, and is met with a warrant, in the name of the city, under which he is fined fifteen dollars for each twenty-four hours that he uses the river bank, or permits his boats to remain there. By this mode of pro-

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ceeding the civil remedy by the city is ignored, and the appellant compelled to abandon the possession in order to avoid the penalties. The injury is irreparable, and a court of equity should not hesitate to grant the relief.

The judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer and award the injunction, etc.

CASE 68—PETITION ORDINARY—DECEMBER 12.

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Brooking v. Farmers' Bank.

APPEAL FROM SCOTT CIRCUIT COURT.

1. A PERSONAL REPRESENTATIVE WHO HAS OVERPAID A CREDITOR under a mistake as to the solvency of the estate can not recover the amount so overpaid if the creditor has been prejudiced by his failure to comply with the law governing the administration and settlement of insolvent estates, or by his bad faith or negligence in any respect. Therefore, where sureties for the debt paid have been released by reason of the negligence of the personal representative, he can not recover.

An administrator paid a creditor in full without availing himself of the time and means afforded by law to ascertain the condition of the estate. In this action, begun nearly five years thereafter, the administrator seeks to recover back the amount so paid upon the ground that the estate has been consumed and rendered insolvent by the payment of a debt adjudged to be a preferred claim in an action involving the settlement of the estate, to which neither the creditor nor the sureties in the note were made parties. *Held*—That as the sureties are released by reason of the delay and negligence of the administrator, he can not recover of the creditor.

2. SURETIES IN A NOTE having been induced to believe, for nearly five years, that the note had been satisfied, and thereby deprived of the opportunity of seeking indemnity, are released.

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GEO. E. PREWITT FOR APPELLANT.

1. The statute is plain. The personal representative, whenever he has paid a creditor an undue proportion of his demand, is entitled to recover the amount of the overpayment. (Gen. Stat., chapter 39, article 2, section 42; Lawson's Adm'r v. Hansbrough, &c., 10 B. M., 147.)
2. The sureties are not released. A surety is never released from liability on account of an act done by the creditor *in entire good faith*, and which appeared at the time to be for the benefit of the surety. (Calloway v. Snapp, 78 Ky., 561; Aaron v. Mendel, *Ibid.*, 427; Story's Eq. Juris., sections 824, 326; Northern Bank of Ky. v. Cook, 13 Bush, 342; Watson v. Poage, 42 Iowa, 582; White & Tudor's Leading Cases, vol. 2, part 2, 4th ed., pages 1877-8; Lee's Adm'r v. Reed, 4 Dana, 118.)
3. The plaintiff is not precluded from recovering, unless he acted in bad faith, or did some act of improper, officious or unwarranted intermeddling, which prevented the sureties from seeking indemnity, which it does not appear that he did.
4. The settlement of the decedent's estate in the Court of Common Pleas is *prima facie* correct as against the defendants, although they were not parties to the suit. (Fauntleroy v. Lyle, 5 Mon., 267; Burns v. Benton, 1 A. K. Mar., 258; Logan's Adm'r v. Troutman, 3 A. K. Mar., 66; 2 Litt., 846; 5 Litt., 121.)

A. DUVALL FOR FARMERS' BANK.

Appellant was guilty of the grossest negligence in not making both the creditor and the sureties parties to the suit against him by the ward of his intestate praying a settlement of his accounts as administrator, which was, in substance and in form, a suit to settle an insolvent estate, and having been thus negligent he can not recover. (Civil Code, section 428.)

W. S. DARNABY FOR APPELLEES THOMAS AND BUTLER.

The sureties are released by reason of the negligence of the creditor in accepting payment without consulting them, and of the administrator in not making them parties to the action against him for a settlement of his accounts. (Calloway v. Snapp, 78 Ky., 563; Aaron v. Mendel, *Ibid.*, 427; Northern Bank v. Cook, 13 Bush, 344.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

May 5, 1874, W. S. Brooking, as principal, and Thomas and Butler, as sureties, executed a note to the Farmers' Bank of Kentucky due September 1, 1874, which, on the day it matured, A. U. Brooking,

Brooking v. Farmers' Bank.

as administrator of W. S. Brooking, who had in the meantime died, paid off, amounting, principal and interest, to one hundred and fifty-five dollars.

This action was instituted August 22, 1879, by the administrator, to recover of the bank the whole amount so paid in 1874, and interest thereon, in virtue of section 42, article 2, chapter 39, General Statutes, which is as follows:

“When a personal representative shall pay to a creditor an undue proportion of his demands, or to a distributee or devisee a part or all of his share or legacy under a mistake as to the solvency of the estate or otherwise, such personal representative may recover from the creditor, distributee, or devisee the amount of the overpayment with interest thereon.”

Subsequently an amended petition, making Thomas and Butler parties, was filed. And March 3, 1880, the bank filed its answer, denying the right of the plaintiff to recover, but asking, in case of a recovery, that the sureties might be adjudged liable to it, and for that purpose the answer was made a cross-petition.

Judgment having been rendered dismissing the petition and cross-petition, the plaintiff appeals.

From an agreed statement of facts it appears that in the year 1858 W. S. Brooking was appointed and qualified as guardian of his nephew, G. Brooking Beaty, then about four years of age, and continued to act as such until his death, though he never made any settlement as required by law.

A. U. Brooking was called on as administrator,

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and made a settlement of the guardian's accounts in the county court, which was admitted to record in May, 1877, and showed a balance in favor of the ward against the estate of about one thousand five hundred dollars. But in July, 1877, G. Brooking Beaty instituted an action in the court of common pleas to surcharge the county court settlement, the result of which was a judgment in his favor rendered in December, 1878, for about thirteen thousand dollars. In that action proceedings were also had for the settlement of the estate of W. S. Brooking, deceased, and the sum of about two thousand two hundred dollars was found in the hands of the administrator, which he was required to pay to the plaintiff, no credit being allowed for the amount paid by him in 1874 to the Farmers' Bank. The personal estate being thus exhausted, the real estate of the deceased, and also a tract of land belonging to a surety in the guardian bond were sold, and after applying the proceeds thereof, in addition to the amount in the hands of the administrator, towards the satisfaction of the plaintiff's debt, which was adjudged to be a preferred claim, there was still a balance of about one thousand nine hundred dollars unpaid.

It farther appears that neither the Farmers' Bank nor the sureties in the note were parties to that action; nor was a repayment of the amount sued for in this action demanded of the bank until May, 1879.

Previous to the act of 1850, which was embodied in the Revised Statutes (see section 40, chapter 37),

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and is similar to the section of the General Statutes quoted, there was no statute expressly authorizing recovery by a personal representative who had paid an undue proportion of the creditor's demand under a mistake as to the solvency of the estate of the decedent. And in *Lawson v. Hansbrough*, 10 B. M., 147, the statute of 1839 was construed to rather negative his right to relief. Nevertheless, it was then held that cases might occur in which an executor or administrator would be entitled to relief. "But," said the court, "to have a good title to such relief, it is indispensable that there should have been no negligence on the part of such personal representative, and that he should have acted with due caution in the payment of the assets. The mere fact that he labored under a mistake at the time in reference to the sufficiency of the assets for the payment of debts does not give him a right to the interposition of a court of equity. The mistake may have resulted from his own negligence in not using the requisite diligence in ascertaining either the amount of available assets or the debts for which the estate was liable."

Although the act of 1850, as well as the present law, in terms gives a right of recovery to the personal representative not previously conferred by express statutory enactment, we do not think it was intended to afford him relief from his mistake in every such case unconditionally and entirely without regard to the question of good faith and diligence on his part. On the contrary, if the creditor has been prejudiced by his failure to comply with

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the law governing the administration and settlement of insolvent estates, or by his bad faith or negligence in any respect, he ought not to recover.

The administrator does not seem to have availed himself of the time and means afforded by law to ascertain the condition of the estate before paying the demand of the Farmers' Bank. But within a short time after his appointment, and on the day the note fell due, he voluntarily paid it in full. And in this action, commenced nearly five years thereafter, he seeks to recover the amount back upon the ground that the estate has been consumed and rendered insolvent by the payment of the preferred debt of Beaty in pursuance of a judgment rendered in an action instituted by him against the heirs and administrator.

A settlement of the estate of the decedent under chapter 3, title 10, Civil Code, was involved in that action, and the proceeding therefor was actually had. Yet, although it was made, by law the duty of the administrator to make the Farmers' Bank, if not the sureties in the note, parties to that proceeding, he negligently or in bad faith failed to do so, and they were thus deprived of the right to either contest the preferred claim of Beaty or call in question the transactions of the administrator himself.

The Farmers' Bank was bound to accept the payment of the note tendered by the administrator, or lose interest on it from that time, as well as hazard its right to look to the sureties; and so far as this record shows, did accept it in good faith, without

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any notice of the claim of Beaty or insolvency of the estate until a short time before this action was commenced.

It seems to us, therefore, that, though the judgment mentioned be regarded as evidence of the insolvency of the estate, the administrator ought not to recover of the Farmers' Bank unless, when this action was commenced, it could maintain its cross-petition against the sureties in the note. For, if they had been discharged, it resulted from the negligence and bad faith of the administrator, and in that case it would be extending the operation of the statute for his benefit farther than reason or analogy authorizes to permit him to recover of the bank.

The mere acceptance by the bank of payment of the note did not of itself have the effect to release the sureties, for that payment was made subject to the right of the administrator, under the statute, to recover it back in case of the insolvency of the estate; and if he had, in good faith and in a reasonable time, commenced the proceeding provided by the Civil Code for the settlement of insolvent estates, and made the Farmers' Bank a party thereto, he might have recovered the amount paid by his mistake; for the discharge thereafter of the sureties, if it had occurred, would have been the fault of the bank, and not of the administrator; but, as has been said, the surety is a favorite of the law, and when any act has been done by the obligee that may injure him, the court is very glad to lay hold of it in his favor.

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In this case the sureties were induced to regard the note as satisfied, and were thereby deprived of the opportunity of seeking indemnity, either from each other or from the estate of the deceased principal in the note; and it may be safely said, according to both reason and authority, that the sureties in a note would be discharged in any case where the obligee has for nearly five years kept them lulled with the assurance the debt has been paid; for, as said by this court in *Aaron v. Mendel*, 78 Ky., 427, when the creditor has been guilty of bad faith towards a surety, the court will not stop to inquire whether he has been actually injured or not.

That was an action by a ward to recover of her guardian and his surety, the defense by the latter being, that about three years before the institution of the action, she had released the guardian of all claim against him. It, however, appeared that the release was unfairly procured, and the court held that if it had been attacked within a reasonable time after it was obtained, or after the influences which induced its execution were removed, and after she was in a condition to assert her rights, it would have afforded her protection to the surety, though he did not participate in the fraud of the guardian; but, said the court, the plaintiff having kept the surety so long in a position in which he was authorized by her conduct to believe he was fully discharged, and in which he was deprived of all right to seek indemnity, she was guilty of such bad faith toward him as ought, in equity and good conscience, to prevent her from recovering.

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The case of Kerby v. Taylor, 6 Johns. Ch'y, 248, was cited, where Chancellor Kent held that a release of the principal by the ward without the knowledge or consent of the surety, and acquiescence in the release for a period of twenty months, there being no pretense of fraud set up, was "a complete exoneration of the surety. He had a perfect right to regard the discharge as valid, and it deprived him in the meantime of the opportunity of obtaining indemnity."

Though bad faith may not in this case be imputed directly to the bank, the effect was the same as to the sureties. They were induced to regard the note as satisfied, and thereby deprived of the opportunity to indemnify themselves, and ought not, after such length of time, be held liable.

When the administrator, without being bound to do so, paid the debt to the bank, the sureties were liable, for nothing had been done to discharge them. They have since become released by the bad faith, not of the bank, but of the administrator. In our opinion, therefore, the latter, and not the former, should suffer the loss.

Wherefore, the judgment is affirmed.

 Brann v. Elzey, &c.

CASE 64—PETITION ORDINARY—DECEMBER 12.

Brann v. Elzey, &c.

APPEAL FROM GRAVES CIRCUIT COURT.

1. AS ESTATES TAIL ARE FORBIDDEN BY our law, and estates that would in former times have been deemed estates tail are now held to be estates in fee-simple, a grantor will not be deemed to have intended to create such an estate if any other construction can be adopted without distorting the meaning of the words used.
2. CASE ADJUDGED.—The deed construed in this case is as follows: "I, John W. Williams, have this day *bargained and sold*, and do hereby transfer and convey, to Jane Williams (wife of Isaac Williams), and to the heirs of her body *by the said Isaac Williams*, a certain tract or parcel of land. * * * * To have and to hold the same to the said Jane Williams and the heirs of her body *by the said Isaac Williams*. Held—That the children of Jane and Isaac Williams are as certainly identified as if they had been named, and that the children took a present interest with their mother.

ROBERTSON, SMITH AND ROBBINS FOR APPELLANT.

1. The words "heirs of her body" were used by the grantor as words of purchase, as is shown by the use of the words in the body of the deed, and by the use of the limiting words, "by Isaac Williams." (Flournoy v. Allen, &c., MS. Op., Ky. Ct. Ap., Dec. 1, 1869; Tucker v. Tucker, 78 Ky., 503; Morton v. Barnett, 39 Am. Dec., 578; Heard v. Horton, 43 Am. Dec., 659; Lackland's Heirs v. Downing, 11 B. M., 32.)
2. The law presumes that the parties to the deed did not intend to create an estate tail, because such estates are forbidden by law. (8 Bush, 523.)
3. The children of "Jane Williams by Isaac Williams" being described in the body of the deed, took a present interest jointly with their mother, and not an interest in remainder. (Webb & Harris v. Holmes, 3 B. M., 405; Foster v. Shreve, 6 Bush, 521; Flournoy v. Allen, &c., MS. Op., Ky. Ct. Ap., Dec. 1, 1869.)
4. It is not necessary that the persons intended to take by a deed shall be named. It is sufficient if they are described with certainty. (Horn, &c., v. Tichenor, 3 Mon., 196; Gearheart v. Tharpe, 9 B. M., 34.)

EDWARD W. HINES ON SAME SIDE.

1. An instrument will not be construed to create an estate tail if it

83	440
129	135

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will allow any other construction without distorting the language. (Breckinridge, &c., v. Denny & Faulkner, 8 Bush, 527.)

2. The words "heirs of her body by the said Isaac Williams" were manifestly intended to mean the children of Jane Williams by Isaac Williams, whom the grantor intended should take a present interest jointly with their mother, and no technical rule should be allowed to defeat that intention. (Flournoy v. Allen, &c., MS. Op., Dec. 1, 1869.)

D. G. PARK FOR APPELLEES.

The words "heirs of her body by the said Isaac Williams" would, "in former times," have created an estate tail special, and, therefore, under the statute create an estate in fee-simple in Jane Williams. (Revised Statutes, chapter 30, section 8; Goode v. Bradley, MS. Op., June, 1856, cited in note to above section of Rev. Stat.; Johnson v. Johnson, 2 Met., 332; True v. Nicholls, 2 Duvall, 547; Washburne on Real Property, vol. 1, chapter 4—sections 22, 28, 26, 27, 31, 32, 33, 34; Asher v. McCarty, 2 Ky. Law Rep., 218.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The rights of the parties to this appeal to the land in contest depend upon the construction to be given to the deed from John W. Williams, dated September 10, 1859.

It provides:

"I, John W. Williams, of the county of Fayette, in the State of Tennessee, have this day *bargained and sold*, and do hereby transfer and convey, to Jane Williams (wife of Isaac Williams), of Graves county, in the State of Kentucky, and to the heirs of her body *by the said Isaac Williams*, for the consideration of one thousand dollars to me in hand paid, a certain tract or parcel of land. * * * *
To have and to hold the same to the said Jane Williams and the heirs of her body *by the said Isaac Williams*."

The statute then and now in force in this State provides:

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"All estates heretofore or hereafter created, which, in former times, would have been deemed estates in tail, shall henceforth be held to be estates in fee-simple." (Revised Statutes, page 227; General Statutes, page 585.)

It is urged upon the one hand that the deed in this instance would, in former times, have been held to create an estate in tail, and that it, therefore, under the statute, vested Jane Williams with the fee-simple title. Upon the other side, it is claimed that she took but a joint interest with her seven children, all of whom were *in esse* when the deed was made.

The words "heirs of the body," or "heirs lawfully begotten of the body," were appropriate to create an estate tail, and it is well settled that their use, or an equivalent expression, are words of limitation, to be construed as creating such an estate in the absence of any other words in the conveyance showing, or from which it can reasonably be inferred, that they were not used in their technical sense.

It has also been held that the words "to her and her *issue* forever," were not less extensive in their import than "heirs of the body," and that as the word "issue" embraced the whole line of lineal descendants, an estate tail was created. The word "posterity" has received a like construction. The word "children," or words equivalent thereto, are not appropriate, however, to create such an estate.

In the case of *True v. Nicholls*, 2 Duvall, 547, the words were, "and to her bodily heirs forever;" and it was properly held that under the former law they would have created an estate tail.

In *Johnson v. Johnson, &c.*, 2 Met., 331, it was also so held, the words used being "and their heirs lawfully begotten of their bodies."

This case, however, is not a similar one. Here the words, both in the granting clause of the deed and its habendum, are "*the heirs of her body by the said Isaac Williams.*"

Estates tail are forbidden by our law; and hence, although the language appears to create such an estate, yet if any other construction will not necessarily distort the meaning of the words used, it will be adopted.

It seems to us, however, that in this instance, there is no need of a strained construction. The words, "to the heirs of her body by the said Isaac Williams," plainly mean their children. This was clearly not only the intention of the grantor, but it is the obvious meaning of the language.

In the case of *Flournoy v. Allen, &c.*, decided by this court on December 1, 1869, the words used in a deed from the husband to his wife and her trustee were: "and in trust for said party of the second part and her heirs *by said party of the first part,*" and to be held "in trust for said Elizabeth Hurt and her heirs *aforesaid* forever;" and it was held to create a joint estate in the mother and her children.

In this instance the children of Jane and Isaac Williams were as certainly identified as if they had been named.

In *Tucker, &c., v. Tucker, &c.*, 78 Ky. Rep., 503, the words used by the grantor were: "to Martha

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Ann Tucker and the heirs of John C. Tucker (her husband), their heirs and assigns forever;" and it was held that the word "heirs," as used, was equivalent to the word "children."

In this case the words used do not denote an indefinite or entire line of heirs; but a certain class clearly identified; and we conclude that they were used as words of purchase, and that the children of Isaac and Jane Williams, by virtue of the deed, acquired an interest *in presenti* with their mother.

It follows that the judgment must be reversed, with directions to overrule the demurrer to the answer, to permit the amended answer to be filed, and for further proceedings in conformity with this opinion.

83	444
84	122
83	444
96	597
83	444
104	588
83	444
106	174

CASE 65—PETITION EQUITY—DECEMBER 17.

City of Covington v. Hoadley, &c.

APPEAL FROM KENTON CIRCUIT COURT.

1. MUNICIPAL CORPORATIONS—SPECIAL LIMITATION LAW.—A provision in the charter of a city that all actions to recover from the city money improperly collected as taxes shall be brought within six months, while the general law provides a limitation of five years as to actions of that character, is not unconstitutional because it grants a special privilege. Legislation as to municipal corporations in their public character rests upon peculiar grounds, owing to the fact that they are agencies of the government.
2. PLEADING PRIVATE STATUTES.—Such statutes being public statutes of local application, it is not necessary to plead them as private statutes are required by the Code to be pleaded.
3. PLEADING LIMITATION.—In this action to recover of appellant money improperly collected as taxes, the averment of the defendant

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that it did not, within six months before the bringing of the action, receive the payments alleged, with the statement that "it pleads and relies upon the statute of limitations in such cases made and provided," is a sufficient plea of the statute of six months.

T. F. HALLAM FOR APPELLANT.

Brief not in record.

WM. GOEBEL FOR APPELLEES.

1. The language of the limitation plea is general. It is, therefore, only a plea of the general limitation law of five years. (*Bell v. Norris*, 79 Ky., 48; *Howell v. Rogers*, 47 Cal., 291.)
2. The special limitation law is invalid because it violates the constitutional rule of equality, and invades private rights. (*Const. of Kentucky*, article 18, section 1; *Commonwealth v. Whipps*, 80 Ky., 277; *Smith v. Warden*, 80 Ky., 610; *Kentucky Trust Co. v. Lewis*, 6 Ky. Law Rep., 547; *Gordon v. Winchester Building Association*, 12 Bush, 110; *Cooley's Const. Limit.*, 5th ed., pages 344-5 and 484-5. Cited in petition for rehearing: *Town of Virden v. Needles*, 98 Ill., 367; *Hubbard v. Brainerd*, 85 Conn., 563; *Cooley's Principles of Const. Law*, page 827.)
3. Special privileges cannot be conferred upon municipal corporations in their *private* character. (*Dillon on Municipal Corporations*, 8d ed., sections 66, 67, 460; *Louisville v. Commonwealth*, 1 Duvall, 297; *Memphis v. Fisher*, 9 Baxter, 239; *Durkee v. Janesville*, 28 Wis., 464.)
4. The cases of *O'Bannon v. L., C. & L. R. R. Co.*, 8 Bush, 348, and *City of Covington v. Voskotter*, 80 Ky., 219, distinguished from this case.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

This action is to recover back municipal taxes paid under a mistake of law and fact, and in ignorance of their rights by the appellees, Hoadley and Bates, to the appellant, the city of Covington, upon agricultural lands, not used for city purposes, or receiving any of the benefits of city government. The appellant, upon the trial below, withdrew all matter of defense, save that contained in the second paragraph of its answer, which reads thus:

For a second defense this defendant says that it

did not, within *six months* next before the bringing of this action, receive from the plaintiffs, or either of them, the payments by them in their petition alleged to have been made, or any or either of the said payments or any part thereof, and it pleads and relies upon the statute of limitation in *such* cases made and provided."

By section 4 of an act to amend the city charter of Covington, approved February 17, 1874, it is provided:

"That all actions to recover from said city the amount of any taxes or assessments which have been or may be illegally or erroneously collected, shall be prosecuted within six months after the cause of action arose, and not afterwards; but this act shall not apply to causes of action now existing until the first day of February, 1875."

It is admitted that none of the money sued for was paid within the six months next prior to the bringing of the action; and it is urged, first, that the limitation provided by said act is not sufficiently pleaded; and second, that if so, it is a grant of special privilege to the city, not in consideration of any public service, and in violation of the general law, and one not accorded to other corporations and persons, and is, therefore, void.

Section 119 of our Civil Code requires a private statute to be specially pleaded by giving its title and the date when it became a law; but the act *supra* is a public one of local application. The action is for taxes improperly collected. The answer expressly says, that they were not received within

six months next prior to the bringing of the suit, and relies "upon the statute of limitation in *such* cases made and provided." By the general law of this State the limitation of an action for mistake, or upon an implied contract, is five years; but the wording of the pleading in this instance unmistakably shows that it did not relate to it, and it is clear that the appellees understood from it that the appellant was relying upon the six months' act, because they endeavored to avoid it by filing a reply, in which they allege that they did not know or discover their rights until within six months next before the bringing of the action.

In the case of the city of Covington v. Voskotter, 80 Ky. Rep., 219, the pleading, relying upon this same statute, was, in substance, similar to the one now under consideration—in fact, in nearly the same language—and it was sustained.

The remaining question is not free from difficulty. It has been said that "no man who is not a lawyer would ever know how to act, and no man who is a lawyer would, in many instances, know how to advise, unless courts were bound by authorities firmly as pagan deities were supposed to be bound by the decrees of fate." While we do not admit the parity of the illustration, because precedent, which is exclusive of right, should not be followed, yet, in this instance, after diligent search, the way seems to have been but slightly blazed.

The cases of O'Bannon v. L., C. & L. R. R. Co., 8 Bush, 348, and Mortimer v. L. & N. R. R. Co., 10 Bush, 485, were brought under statutes extending

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the common law liability, or creating a new right, and it and the method and time for its assertion were declared by the same statute. In the City of Covington v. Voskotter, *supra*, it was urged that the act now in question was unconstitutional, but upon the ground that it was in violation of the constitutional provision, which requires that an act of the Legislature shall relate to but one subject, which shall be expressed in the title, and not because it was unequal and partial legislation.

It is proper, however, to suppose that the court then viewed the act from all points, and although the opinion does not discuss the objection to it now urged, yet, as it held it to be constitutional, we can not consider, therefore, that there is an entire absence of authority upon the question.

Unquestionably, the law should aim at equal rights and privileges. The genius of our government and institutions requires it. Special privileges are obnoxious, and class legislation can not be tolerated. The rights of every person must depend upon the law that governs every other member of the body-politic under like circumstances.

It has, therefore, been held by this court that an act extending the time for an officer to distrain for his fee bills beyond that allowed by the general law, gives him a *special* privilege, and is, therefore, unconstitutional. (Smith, Guardian, &c., v. Warden, 80 Ky., 608.) Also, that an act giving to a corporation the right to sell, *without the intervention of a court*, land mortgaged or conveyed to it in trust, when the general law did not permit it, was class or

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partial legislation, and, therefore, void. (Ky. Trust Co. v. Lewis, 82 Ky. Rep., 579.)

But the opinions in these cases must be regarded as speaking of *private* and not *public* statutes. Legislation as to public or municipal corporations rests upon peculiar grounds, owing to the fact that, unlike private corporations, they are agencies of the government.

The city of Covington, within its boundary, governs for the State, and the latter administers the law through the municipality. Its action is the exercise of sovereignty or governmental power. Its character is public, it performs public duties, and it can only be regarded as having a private character in a modified sense.

A statute like the one we are now considering, relating to the exercise of its governmental power, is a public one of local application. It is as general in its operation as if it related to the entire State, the only distinction being that it is limited in territory. Mr. Cooley, in his work on Constitutional Limitations, page 482, says:

“Laws, public in their objects, may, unless express constitutional provision forbids, be either general or local in their application. * * * * * The Legislature may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases, and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. * * * * * If the laws be other-

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wise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the Legislature must judge."

It is urged, however, that as to claims against it for taxes improperly assessed or collected, the municipality can only be regarded as a *private* corporation; and has, therefore, only the rights of a private person. It is sustained by the exercise of the sovereign power of taxation. All of its acts relating to taxes, whether performed in their collection or in controlling and disposing of them after collection, are based upon its governmental function. All are equally important to the general municipal public, and vital to the existence of the municipality. Whether it be a question as to the exercise of the taxing power or of relief against its abuse, the governmental prerogative is involved; and as to it the Legislature may provide as it sees proper, provided the law be public in its character, and general in its application to the locality. If it relates to the exercise of a governmental power, whether by way of use or abuse, it can not be regarded as a private statute, but must be treated as relating to the municipality in its public character.

It is the rule in this country, rather than the exception, to provide municipalities with a limitation law different from that provided by the general law. The reason is obvious. The municipal officers and agents are changed often; and that which can be easily ascertained to-day by reason of their presence

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and assistance may be difficult or impossible of ascertainment a year hence. Moreover, public policy dictates that the question, whether taxes have been properly assessed or collected should, owing to constant governmental needs and uses, not be left open save for a reasonable time.

It is not necessary to decide how general in its character a special law of limitation in behalf of a municipality may be. The one in question does not relate to property or rights it may own or possess in a private character, and which are not exercised or used strictly for governmental purposes, but to the sovereign power of taxation, and must, therefore, be sustained.

Judgment reversed, with directions to dismiss the petition.

CASE 66—MANDAMUS—DECEMBER 17.

Atchison, County Judge, v. Lucas.
Duncan v. Same.

APPEALS FROM DAVIES CIRCUIT COURT.

1. WOMEN ARE NOT ELIGIBLE TO OFFICES created by the Constitution of this State, and are, therefore, not eligible to the office of jailer.
2. MANDAMUS.—An applicant for a writ of mandamus must show a clear legal right to have the duty performed. Therefore, when it appears that one is constitutionally ineligible to an office to which he has been elected, his application for a writ of mandamus requiring the county judge to permit him to qualify, should be refused.

In this case the applicant for the writ, who held the certificate of election, being ineligible under the Constitution, the writ should

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have been refused, although there had been no decision of the contesting board adverse to the applicant when she offered to qualify in the county court.

3. THE CONTESTING ELECTION BOARD has the power to inquire and determine whether one elected to an office possesses the qualifications prescribed by the Constitution, and from its decision an appeal may be taken to the circuit court, and thence to the Court of Appeals.

In this case, after the candidate holding the certificate of election had offered to qualify in the county court, the contesting board decided that she was ineligible. *Held*—That her remedy was by an appeal, as indicated, to have her constitutional right to the office determined.

4. SUPERSEDEAS.—The execution of a writ of mandamus may be stayed by supersedeas.
5. COMPENSATION OF ACTING JAILER.—One who acted as jailer under circumstances which gave her color of title is entitled to the amount allowed her by the circuit court for dieting prisoners as against the person entitled to the office, although she may not be entitled to the fees for committing and releasing prisoners, etc., which amount to an unimportant sum over which this court has no jurisdiction.

C. S. WALKER FOR APPELLANT ATCHISON.

1. The approval of an official bond is a judicial and not a ministerial act or duty, and is not compellable by mandamus. (Civil Code, section 477; *Goheen v. Myers*, 18 B. Mon., 426; *Cate v. Ross*, 2 Duv., 244; *Ex parte Harris*, 52 Ala., 87; 28 Am. Rep., 559; General Statutes, chapter 61, section 1, page 566; *Ibid.*, chapter 48, section 4, page 508.)
2. In determining that, pending the contest as to the election, appellee was not entitled to qualify as jailer appellant acted judicially, and his decision can not be reviewed or corrected by mandamus. (General Statutes, chapter 33, article 7, section 8, page 392; *Gorham v. Luckett*, 6 B. Mon., 157-8; *Commonwealth v. Jones*, 10 Bush, 749; General Statutes, chapter 33, article 7; *Wood on Mandamus*, 20-1; *County Court of Warren v. Daniel*, 2 Bibb, 578; *Louisville v. McKean*, 18 B. Mon., 17; *Goheen v. Myers*, 18 B. Mon., 426.)
3. Pending the contest about the office before the county board, appellee had no right to qualify as jailer. (General Statutes, chapter 33, article 7, section 4, page 390; *Ibid.*, section 6, page 391; *Ibid.*, section 8, page 392; *Wood on Mandamus*, 29.)
4. Mandamus will not lie where there is a specific legal remedy other than by the writ for the enforcement of one's rights. (*Wood on Mandamus*, 18; *Goheen v. Myers*, 18 B. Mon., 426; *Stevens v.*

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Wyatt, 16 B. Mon., 548; *Ex parte* Harris, 52 Ala., 87; 23 Am. Rep., 560.)

5. When one who has a certificate of election is notoriously ineligible to the office under the Constitution, it is the duty of the county court to refuse to qualify such an one on application to qualify and there is nothing in *Patterson v. Miller*, 2 Met., 498, in conflict with this proposition. (Civil Code, section 484.)
6. But whether the county court has or not the power to inquire into the eligibility of an applicant having a certificate of election, the circuit court clearly has no power to compel by mandamus the county court to qualify such an one, except as he has a constitutional right to the office. (*Justices of Jefferson Co. v. Clark*, 1 Mon., 82; *Justices of Spencer Co. v. Harcourt*, 4 B. Mon., 499; *Lowe v. Phelps*, 14 Bush, 647.)
7. In Kentucky a woman is not eligible to a constitutional office. (Constitution, article 2, section 8; *Ibid.*, article 6, sections 1 and 2; 14th Amendment to Constitution of the United States; *Amy v. Smith*, 1 Litt., 382-3; *Burkett v. McCarty*, 10 Bush, 761; *Webster's Dictionary*, "Citizen;" *Bouvier's Law Dictionary*, "Citizen;" *Minor v. Happersett*, 21 Wall., 162; *Robinson's Case*, 181 Mass., 376; 41 Am. Rep., 239; General Statutes, chapter 67, section 1, page 610; *The People ex rel Turman v. Clute*, 50 N. Y., 451; 10 Am. Rep., 511; *Bradwell v. The State*, 16 Wall., 141.)

JAMES STUART, W. N. SWEENEY & SON AND WEIR, WEIR & WALKER ON SAME SIDE.

W. N. SWEENEY & SON FOR APPELLANT DUNCAN.

1. So soon as Duncan was appointed, the powers of Mrs. Lucas ceased. She, therefore, had no right to the fees allowed and certified in her favor, which accrued after she became *functus officio*. (Gen. Stat., pages 384, 386, 392, 567; 16 B. M., 546; Civil Code, section 488.)
2. That the appeal lies is clear. (*Bruce v. Fox*, 1 Dana, 447.)

JAMES STUART AND WEIR, WEIR & WALKER ON SAME SIDE.

GEO. W. WILLIAMS, HAYCRAFT & SLACK AND GEO. W. JOLLY FOR APPELLEE.

1. The title to an office can not be inquired into in an action for mandamus. (High on Ext. Legal Remedies, section 49; *Moses on Mandamus*, 49; *People v. Olds*, 8 Cal., 167; *People v. Stevens*, 5 Hill, 616; *Ex parte Doughtry*, 6 Iredell, 155.)
2. Appellee holding the certificate of election, the county judge was bound to allow her to qualify. He had no power to inquire as to her eligibility or qualifications. (*Patterson v. Miller*, 2 Met., 497; *Cate v. Ross*, 2 Duv., 244.)

Atchison, County Judge, v. Lucas. Duncan v. Same.

3. Mandamus is the proper remedy where the act to be performed is ministerial in its character, or if judicial, where the object is to compel the inferior tribunal to entertain and decide the matter. (Clark v. McKenzie, 7 Bush, 523; Arberry v. Beavers, 6 Texas, 457; High on Ext. Legal Remedies, sections 151 and 152.)
4. Votes cast for a candidate who is ineligible are not void. (Commonwealth v. Cluly, 56 Pa. St., 270; Smith v. Brown, 2 Bartlett, 395; McCrary on Elections, sections 233, 234; Cochran v. Jones, 14 Am. Law Reg., 235; In matter of Corliss, 16 Am. Law Reg., 15; Lee-man v. Hinton, 1 Duv., 37; Gen. Stat., chapter 38, article 7, section 8.)
5. It was the intention of the law-makers that, pending a contest, the person holding the certificate of election should qualify and exercise the functions of the office. This rule of law is universal. (McCrary on Elections, section 204 and section 221, and authority cited.)
6. The right to hold office "belongs equally to all persons whomsoever not excluded by the Constitution." (Gibbons v. Ogden, 9 Wheaton, 188; Magna Charta; Const. of Ky., article 6, section 2; Bill of Rights, section 4; Cooley's Const. Limit. (5th ed.), pages 36-7; Hamilton v. St. Louis County Court, 15 Mo., 13; Barker v. The People, 8 Cowen, 686.)

W. P. D. BUSH AND R. W. SLACK FOR APPELLEE IN DUNCAN v. LUCAS.

Duncan was not appointed and qualified as provided by law, and, therefore, his appointment and qualification did not divest Mrs. Lucas of the right conferred by her appointment to "act for the occasion." It is, therefore, clear that Mrs. Lucas is entitled to the allowance made under and by virtue of her appointment. (Gen. Stat., chapter 61, article 1, sections 8 and 9.)

STATEMENT OF FACTS IN DUNCAN v. LUCAS.

On the 14th day of July, 1884, there being a vacancy in the office of jailer of Daviess county, caused by the death of the last jailer, the widow and a son of the deceased jailer were appointed by the county judge as a "committee," to take charge of the jail and diet the prisoners. On the 4th day of August following an election was held to fill the vacancy in the office, and M. C. Lucas, the widow of the deceased jailer, being a candidate, and receiving the highest number of votes, received the certificate of election. Appellant Duncan, the opposing candidate, contested the election of Mrs. Lucas, the appellee, and on the 19th of September, 1884, the contesting board adjudged that Mrs. Lucas was ineligible. Thereupon the county court entered an order "discharging" appellee and her son as a "committee," declared the office vacant, and appointed

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Duncan to fill the vacancy. In the meantime, however, the circuit court had awarded a mandamus against the county judge, requiring him to permit Mrs. Lucas to qualify, but the execution of the writ had been superseded. Duncan having taken the oath and executed bond, which was approved, demanded of appellee the possession of the jail and prisoners, which was refused. November 1, 1884, appellee, who was still acting as jailer, presented her claim to the circuit court for dieting prisoners, etc., from August 21 to October 21, 1884. The claim being allowed, appellant filed his petition asking the court to set aside the order of allowance, and to certify the claim in his favor, setting up his title to the office by virtue of his appointment. This appeal is prosecuted by Duncan from an order of the court refusing to set aside the order of allowance to appellee.

The facts in the case of Atchison, County Judge, v. Lucas are stated in the opinion.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee, Mrs. M. C. Lucas, filed her petition in the Daviess Circuit Court, asking a mandamus against the appellant, who was the county judge of Daviess county, compelling him to permit her to qualify as jailer of that county. It is alleged in her petition that she was elected to that office at the August election, 1884, by the qualified voters of the county, receiving the highest number of votes cast; that by a comparison of the poll-books by those authorized by law to compare them, it was ascertained that she was elected, and a certificate of that fact is filed with and made part of her petition; that she appeared in the Daviess County Court, of which court the appellant Atchison was the presiding judge, his court being then in session, and producing to him her certificate of election, offered to qualify by taking the oath and executing a bond with good and sufficient sureties; that the defendant refused to permit her to qualify, to administer the oath, or accept her bond.

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S. F. Duncan, the opposing candidate, who had been defeated by her at the polls, was, at the time the appellee offered to qualify, contesting her right to the office before the county board, on the ground that the appellee, being a female, was ineligible; and this was substantially the defense relied on by the county judge.

A demurrer was sustained to his answer, and failing to plead further, a peremptory mandamus was awarded, directing the appellant to permit the appellee to qualify as jailer.

This action of the circuit court was stayed by supersedeas, and the case is here on the appeal of the county judge as well as the appeal of the contestant, Duncan.

It is maintained by counsel for the appellee that the county judge had no right to supersede the execution of the writ, and if permitted to do so the effect would be to destroy a remedy for immediate relief, and where no delay should exist in its execution.

While the writ is purely mandatory and not remedial, we find nothing in the Code of Practice with reference to the right of appeal distinguishing a proceeding of this character from a final order or judgment in other cases. No exception has been made, but, on the contrary, when the Commonwealth is affected by a final order on an application for a mandamus, the Attorney General may prosecute an appeal without security, as provided by section 478 of the Code, the framers of the Code doubting the right of the Attorney General to appeal without

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special authority, leaving the right of appeal by parties litigants from the final orders and judgments of the circuit court, except in cases where the right has been withheld. It is well settled that the title to an office can not be determined in a proceeding by mandamus, and we think equally as well settled in this State that the person elected, or who has received the highest number of votes for an office exclusively within the gift of the voters of his county, and obtains a certificate to that effect from the examining board, is entitled to qualify. This rule, however, must have its exceptions, and in a case where the person applying is a citizen, has all the requisites of age, residence, etc., prescribed by the Constitution, and still not entitled to hold an office, why should the county judge permit her to qualify and enter upon the discharge of its duties? When the person presenting the certificate of election has the right to hold the office in the event he possesses the qualifications prescribed by the Constitution, then the county judge would have no right to inquire into the eligibility of the party presenting the certificate, or to convert himself into a contesting board with a view of determining who of the rival candidates had been elected. Other tribunals have been created for the purpose of determining such questions, and it is composed, with reference to county offices, of the presiding judge and the two justices residing nearest the court-house. The county judge in this case could not properly act, and his place was filled in accordance with subsection 4 of section 13 of chapter 33, General Statutes.

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In the case of *Patterson v. Miller*, 2 Met., 493, this court said: "The duty which the law devolves upon the county court in regard to the sheriff only extends to administering the oath of office and taking the bond. This duty is incumbent on the county court whenever a person claiming to be entitled to the office of sheriff presents his certificate of election from the proper board. The court has no power to inquire into his eligibility, or to refuse to permit him to qualify and execute bond according to law on the ground that he is ineligible to office."

The county judge, therefore, in determining the eligibility of the appellee, would, under the general rule applicable to such cases, have assumed a jurisdiction not belonging to that tribunal, and mandamus would have been the proper remedy to compel the discharge of this simple duty.

It is not a question in this case as to the solvency or the sufficiency of the sureties, or an attempt on the part of the circuit court to interfere with the discretion of the county judge as to the character of the bond; but the complaint is, that the county judge has declined to act in any manner. He could, therefore, in a proper case, be compelled to act, but having the discretion as to the sufficiency of the sureties, the circuit judge was powerless to control its exercise. All that the circuit judge has done in this case is to compel the county judge to entertain the motion. (*Clark v. McKenzie*, 7 Bush, 523; *Cate v. Ross*, 2 Duvall, 243; *High on Extraordinary Legal Remedies*, sections 151, 152.)

The contesting board, after the offer by the appel-

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lee to qualify in the county court, adjudged that she was ineligible to the office, and thereupon the county judge declared the office vacant, and appointed the appellant Duncan to fill the vacancy until an election should take place. The power of the contesting board to determine the candidate ineligible is given by section 8, article 7, chapter 33, General Statutes, and their right to make such an inquiry has been heretofore decided by this court in the case of the Commonwealth v. Jones, 10 Bush, 725.

By section 11 of the same article it is provided, that "when a new election is ordered, or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is not adjudged to another, it shall be deemed to be vacant."

An appeal is allowed from the decision of the contesting board to the circuit court of the county in which the contestant resides, and from thence to the Court of Appeals, as in other cases. The appellee's remedy, when the decision of the contesting board was adverse to her right, was by an appeal to the Court of Appeals, and there her constitutional right to hold the office could have been determined; but it is insisted that when the application was made to the county judge there was no decision adverse to the appellee, and, therefore, it was the duty of the county judge to obey the writ.

It may be conceded for the purposes of this case that no supersedeas could have issued in order to stay the writ; that the certificate of election is the evidence of the right to qualify, and the party holding such a certificate is not compelled to postpone

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his application to qualify until the decision of the contesting board is rendered; yet it by no means follows that the circuit judge is required to award a mandamus upon this evidence of the right to the office.

The party making the application for the writ must show a clear legal right on his part to have the duty performed. If, therefore, it appeared from the petition of the appellee that she was constitutionally ineligible to the office of jailer, the circuit judge should have refused the writ.

The case of *Patterson v. Miller*, above, determining the duty of the county court in regard to the qualification of county officers, did not arise from any mandatory order from the one court to the other, but was an action of trespass against Miller, who had seized the property of the plaintiff, pretending to be the sheriff of Russell county, when, in fact, he was not the sheriff, this court holding that the fact of his qualification in the county court as sheriff could not be relied on to prove his eligibility to the office, for the reason the county court had no right to make such an inquiry. In the case being considered, if the appellee was not entitled to the office under any state of case on account of her sex, or if the office had been declared vacant by the contesting board, as provided by statute, we see no reason why the county court, in either instance, could not refuse the application to qualify; and certainly, when applying to the circuit judge asking a mandamus, she must allege a state of facts showing her entitled to the writ.

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In the case of the Justices of Jefferson County v. Clark, 1 Monroe, 82, Clark had been appointed a justice, but the county court refused to permit him to take his seat on the ground that his appointment was in violation of the Constitution. He applied for and obtained a mandamus compelling the county court to permit him to take his seat. The writ was awarded, and, on an appeal to this court, it was held that the plaintiff must "show a legal right to that which he demands, and having failed to do so, the award of a peremptory mandamus by the circuit court is erroneous." The decision is based on the ground that the appointment of Clark by the Governor was unconstitutional.

In Justices of Spencer County Court v. Harcourt, 4 B. M., 499, the latter was held by his associate justices not entitled to hold the office of justice of the peace, because he was at the time holding the office of postmaster under the Federal Government. The office was declared vacant by the county court, and the circuit judge, on the application of Harcourt, made an order for peremptory mandamus against the justices. On an appeal by the justices to this court, it was held that the order of the county court declaring the office vacant did not have the effect of removing Harcourt, as the justices had no judicial power over the subject; but though they had not the power to remove or determine judicially that the office had been forfeited, to entitle Harcourt to sustain his application for a peremptory mandamus, etc., he must show that he was a justice of the peace, and had the constitutional and legal right to

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discharge the duties of the office. The two offices being incompatible, could not be held and the duties discharged at the same time by the same person, and therefore it was error to award the writ. The judgment of the circuit court was reversed.

In *Lowe v. Phelps*, 14 Bush, 642, this court said:

"Mandamus can not be maintained unless there is a legal right in the appellant and a corresponding duty imposed by law on the appellee."

It is plain, therefore, that if the appellee cannot hold the office of jailer under the Constitution, the writ should have been withheld, and this at last is the vital question presented on the appeal.

Section 8, article 2, of the Constitution provides, that "every free *white male* citizen of the age of twenty-one years, who has resided in the State two years, or in the county, town, or city in which he offers to vote one year next preceding the election, shall be a voter, but such voter shall have been a resident of the precinct in which he offers to vote, and he shall vote in said precinct and not elsewhere."

Section 1, of article 6, of the Constitution provides that certain officers, including jailer, shall be elected, etc., and section 2 of the same article prescribes the qualifications as follows:

"No person shall be eligible to the offices mentioned in this article who is not at the time twenty-four years old (except clerks of county and circuit courts, sheriffs, constables, and county attorneys, who shall be eligible at the age of twenty-one years), a citizen of the United States, and who has not resided

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two years next preceding the election in the State, and one year in the county or district for which he is a candidate."

The fourteenth amendment to the Constitution of the United States defines who are citizens in the following language: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It is, therefore, not necessary to discuss the meaning of the word person or the word citizen as used in the State Constitution, as both include women as well as men in the most comprehensive sense; but being a citizen does not necessarily entitle one to the right of suffrage or the right to hold any constitutional office. By the provisions of the Constitution of this State, adopted in the year 1792, and by a like provision of the Constitution of 1799, as well as in the present Constitution, women were excluded from the right of suffrage by conferring that right upon *male citizens* alone, and it would be a singular construction of that provision in either Constitution to determine that women should have no voice in the selection of those who are to fill the offices created by the Constitution, and at the same time given the right to fill those offices if elected by the popular vote.

While our form of government is based on the theory that the people are capable of choosing their own officers, and under our State Constitution all persons are eligible to office not excluded by its provisions, it necessarily follows, it seems to us,

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that when women are excluded from the right to vote when these officers are to be elected, they are also excluded from the right to hold the offices voted for. Besides, words importing the masculine gender are used throughout the entire Constitution when prescribing the qualifications of the citizen for the various offices created by that instrument, showing a plain purpose of restricting not only the right to vote but the right to hold those offices to the male citizen. In prescribing the qualifications of the Governor: *He* shall be thirty-five years of age, etc., shall be ineligible for the succeeding four years after the expiration of the term for which *he* shall have been elected. As to the Lieutenant-Governor: *He* shall, by virtue of his office, be Speaker of the Senate. A Judge of the Court of Appeals must be a resident of the district in which *he* may be a candidate. A jailer must have resided one year in the county in which *he* is a candidate.

It is true that, under the rule for the construction of statutes, a word importing the masculine gender may and often is extended or applied to females as well as males, and this rule is adopted that the will or intent of the law-making power may become effectual, and the object in view accomplished.

If it appeared from the provisions of the Constitution that the framers of that instrument intended to confer the right to hold office on the female citizen as well as the male citizen, although certain words are used implying the right in the male citizen only, this court, in order to carry out that

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intent, would hold that these rights belonged to the one as well as the other.

After a careful consideration of the entire instrument, we find no room for such a construction; but, on the contrary, so many provisions repugnant to such a view of the question as amounts to the exclusion of females from the exercise of the rights claimed.

At common law, a woman could not hold any public office, and with three Constitutions adopted for this State, beginning with the formation of the State Government, with the right of women during this entire period to vote for and hold these constitutional offices at least asserted, if not generally discussed, we find no change made from the adoption of the first Constitution to the present time with reference to the exercise of these great rights, and it seems to us to be unreasonable to hold that, while the right to vote is denied them, the greater right, that of holding the offices voted for, is secured to them by that instrument, or at least not prohibited by its provisions. The entire framework of the Constitution forbids such a construction.

In the case of *Minor v. Happersett*, 21 Wall., 162, upon a writ of error to the Supreme Court of Missouri from the Supreme Court of the United States, Mrs. Minor, wishing to vote for electors for President, applied to be registered as a lawful voter. This Happersett refused to do on the ground that she was not a male citizen of the United States, the Constitution of the State of Missouri providing that "every male citizen of the United States shall be

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entitled to vote." The officer was sued by Mrs. Minor, and the case finally carried to the Supreme Court of the United States, where it was held that neither the Constitution nor the fourteenth amendment, now a part of it, made all citizens voters; further, that a provision in a State Constitution which confines the right of voting to male citizens of the United States, is no violation of the Federal Constitution. In such a State women have no right to vote.

A question was presented to the Supreme Court of Massachusetts as to the right of a woman to hold the office of justice of the peace. It was held that a woman formally appointed and commissioned a justice of the peace would have no constitutional or legal authority to exercise any of the functions appertaining to that office. (Supplement, 107 Mass., 604.)

Many other authorities might be cited with reference to the same subject, denying the right here insisted on by the appellee, and none have been produced showing a different construction of constitutional provisions similar in effect to the organic law of this State.

We do not mean to adjudge that offices of legislative creation may not be filled by women, or the right of suffrage granted them in certain cases; but, on the contrary, such rights may be conferred. We have been discussing only the provisions of the Constitution affecting the right of suffrage, and the right to hold office when applied to offices created by the Constitution.

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The provisions of the organic law must be construed as we find them. It is not for the court to make an innovation upon what has been the recognized construction of these constitutional provisions for nearly a century, and although the voters of the county of Daviess have selected the appellee as their choice for jailer, we feel constrained to adjudge that she can not hold this office under the Constitution. Why women should be excluded from the right to discharge such public trusts is not the subject of inquiry in this case. That the appellee in the present instance is well qualified to discharge the duties of jailer is not questioned; but until some change is made in the organic law, by which such rights may be legally and constitutionally asserted, they must be denied. The judgment as to Atchison, the county judge, is, therefore, reversed, with directions to dismiss appellee's petition.

On the appeal of Duncan, who was not entitled to the office by reason of the ineligibility of the appellee, he did become entitled to it when the office became vacant, under an appointment from the county judge. He is claiming on his appeal the allowance made to the appellee for her services as jailer by the circuit court, and while he may be entitled to the fees, they amount to an insignificant sum, and over which this court has no jurisdiction. The entire account is for two hundred and ninety-four dollars, a dollar or two of which is for committing and releasing prisoners; the balance is for food and diet actually furnished the prisoners in jail, and purchased by money from the pocket of the

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appellee. If the appellant had furnished this food, etc., he would have been compelled to pay for it out of his own means, or could only be entitled to the profits less the costs. It is not the mere ministerial or executive labor of entering orders, serving summons, releasing prisoners, etc., but means of the appellee furnished from her own resources, and it would be against every rule of law, equity, and good conscience to take this from the appellee and give it to the appellant. If a mere usurper, the court might have refused to make the allowance, but it has been made, and under circumstances that this court would not reverse the order in favor of one who has no claim to it.

Judgment as to Duncan affirmed.

CASE 67—PETITION ORDINARY—DECEMBER 17.

Imperial Fire Ins. Co. v. Kiernan.
Northern Ins. Co. v. Same.

APPEALS FROM JEFFERSON COURT OF COMMON PLEAS.

1. FIRE INSURANCE—CONDITION AS TO OCCUPANCY.—Where a policy of fire insurance describes the house insured as "occupied as a family residence," and by a subsequent clause provides that the policy shall become void if the house "shall be or become vacant or unoccupied," the words "occupied as a family residence" must be regarded as but a representation as to the then use of the house, and the subsequent words as but an undertaking by the insured that the house shall not be without an occupant during the time covered by the policy.

In this case it is held that such a policy did not become void upon the house insured ceasing to be occupied as a family resi-

88	468
90	149
83	468
109	260

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dence, it continuing to be occupied by one person, who had access to the entire building for the purpose of caring for it.

2. A MOTION FOR A NEW TRIAL MUST BE MADE within three days after the verdict is returned, whether the verdict be general or special, although judgment may not have been entered upon the verdict.
3. SPECIAL VERDICTS.—The finding of facts by a jury in answer to questions submitted to them in writing constitutes a special verdict, and to entitle the plaintiff to judgment upon such a verdict, it is not necessary that the jury should declare that if, upon the facts found, the plaintiff is entitled to recover, he is entitled to a certain sum, naming it, or that his damages are so much.

In an action upon a policy of insurance, it was admitted that the parties had, by agreement through arbitrators, fixed the entire loss, but what amount had been awarded was in issue. The jury found the amount of the award, which was greater than the amount of the policy. *Held*—That upon this verdict the court was authorized to render judgment for the amount of the policy, the question as to the amount for which judgment should be rendered being, under the circumstances, merely a legal one, and involving no question of fact.

F. T. FOX, JR., FOR APPELLANTS.

1. A special verdict must find all the essential facts. The verdict in this case did not authorize a judgment for the plaintiff, because it did not find any sum for which judgment should be given if the law should be found for him. (Wait's N. Y. Annotated Code, section 260 page 464; Manning v. Monaghan, 28 N. Y., 539-41; Eiseman v. Swan, 6 Bosworth, 669; L., C. & L. R. R. Co. v. Case, 9 Bush, 734; Walker's American Law, pages 645-6 and note a; Carruthers' History of a Law Suit, page 232; Minor's Institutes, vol. 4, part 1, pages 750-58; Hann v. Field, Littell's Select Cases, 377; McClean v. Cooper, 8 Call, 867; Bacon's Abr., Title, Verdict E.; Fryer v. Roe, 12 Com. Bench, 487, and note, 444; Barnes v. Williams, 11 Wheat., 415; 4 How., 148; 20 How., 441; 8 Howard, 484; 28 Wall., 162; 91 U. S., 181; Witty v. C. O. & S. W. R. R. Co., 6 Ky. Law Rep.)
2. The trial was not ended until the "decision" or judgment was rendered, and, therefore, the motion for a new trial was made in time. (Foneskes' Actions at Law, page 148; Smith's Actions at Law, page 184.) Allen v. Hill, 16 Cal., 117, is not authority in this State, as it does not appear what are the provisions of the California Code upon this subject.
3. The conditions of the policy sued on required the insured house to be occupied as a family residence during the entire contract, and if at any time during the year it became vacant or unoccupied as a family residence, without notice to defendant, the policy became

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void. (Dennison v. Phoenix Ins. Co., 52 Iowa, 457; Keith v. Quincy M. Fire Ins. Co., 10 Allen, 228; Am. Ins. Co. v. Paddfield, 78 Ill., 167; Ashford v. B. M. Fire Ins. Co., 112 Mass., 422; Poor v. Humboldt Ins. Co., 125 Mass., 274; Corrigan v. Conn. Fire Ins. Co., 122 Mass., 298; Harrison v. City Fire Ins. Co., 21 Allen (Mass.), 281; Cook v. The Continental Ins. Co., 70 Mo., 610; Herrmann v. Adriatic Fire Ins. Co., 85 N. Y., 163; Paine v. Agricultural Ins. Co., 5 N. Y., S. C., 619; Abrahams v. Agr. Ins. Co., 40 Up. Can., Q. B., 175; Sleeper v. N. H. Fire Ins. Co., 58 N. H., 401; The Am. Ins. Co. v. Foster, 92 Ill., 835; Ætna Ins. Co. v. Meyers, 63 Ind., 238; Wustum v. City Fire Ins. Co., 15 Wis., 138; Cummins v. Agr. Ins. Co., 67 N. Y., 262; Hill v. Eq. M. F. Ins. Co., 58 N. H., 82; McLure v. Watertown Fire Ins. Co., 90 Pa. State; Wood on Insurance, page 184; Kelly v. Worcester M. Fire Ins. Co., 97 Mass., 286; North American Fire Ins. Co. v. Zaenger, 63 Ill., 464; Jackson, &c., v. Ætna Ins. Co., 16 B. M., 258-9; 13 Bush, 317; Germania Ins. Co. v. Rudwig, 79 Ky.; Bennett v. Agr. Ins. Co., Ins. Law Journal, Aug., 1883.)

HARGIS AND EASTIN ON SAME SIDE.

1. There being no general or special verdict as to the amount plaintiff was entitled to recover, there was no verdict for damages on which to base a judgment.
 2. The award of the arbitrators was not declared on, and, therefore, furnished no excuse for the court assuming the functions of the jury and fixing the damages.
 3. The finding as to occupancy is against the evidence.
- Brief of associate counsel referred to for authorities.

WM. LINDSAY FOR APPELLEE.

1. Policies of insurance are to be construed against the company when questions of doubt arise. (Evans v. Sanders, 8 Porter, Ala., 496; Insurance Co. v. Bland, 9 Dana, 151; Ætna Ins. Co. v. Jackson, 16 B. M., 259; Wood on Fire Insurance, page 146; Reynolds v. Ins. Co., 47 N. Y., 597.)
2. The words in the policy describing the house insured as a "family residence" are mere words of description, and are to be treated as a representation, and not as a warranty. (Act of Feb. 4, 1874, Bullitt & Feland's Gen. Stat., page 859; Germania Ins. Co. v. Rudwig, 3 Ky. Law Rep., 721.)
3. These words of description do not imply an agreement that the property insured shall continue in the same condition, or literally in the same kind of occupation during the term of the insurance, or that the house will continue to be occupied. (Wood on Fire Insurance, section 90, page 184; Cum. Valley Ins. Co. v. Douglass, 58 Pa. St., 419; Bryan v. Peabody Ins. Co., 8 W. Va., 605.)

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4. A single inhabitant eating and sleeping in the house, charged with the duty of taking care of it, constitutes an "occupation" within the meaning of that word as used in insurance policies. (*Stupetski v. Transatlantic Ins. Co.*, 88 Am. Rep., 196; *Herrmann v. Merchants' Ins. Co.*, 81 N. Y., 184; 85 N. Y., 169; *Am. Ins. Co. v. Padfield*, 78 Ill., 169; *Harrigan v. Fitchburg Ins. Co.*, 124 Mass., 128.)
- S. F. J. TRABUE, JR., ON SAME SIDE.
1. The time within which a motion for a new trial must be made is to be counted from the return of the verdict, and not from the rendition of judgment thereon. (*People ex rel Allen v. Hill et al.*, 16 Cal., 113; *Peabody v. Phelps*, 9 Cal., 218.)
2. The words "occupied as a family residence" were not intended as a warranty. (81 N. Y., 184.)
3. These words are to be treated as a representation, and not as a warranty, regardless of the intention. (*Bullitt & Feland's Stat.*, page 968; *Germania Ins. Co. v. Rudwig*, 8 Ky. Law Rep., 721.)
4. An occupancy by one person was all that was necessary to satisfy the conditions of the policy. (*Shearman v. Niagara Fire Insurance Co.*, 46 N. Y., 582-3.)
5. The special verdict was, in substance and in form, in strict conformity to the Code. (Civil Code of Practice, sections 826 and 827.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The policy of insurance issued by the appellants to the appellee, John Kiernan, was for one year from January 15, 1881, and described the property as "his two-story brick, single roof building, *occupied as a family residence.*"

A subsequent clause provided for its becoming void in these words: "or shall be or become *vacant or unoccupied* without notice to and consent of these companies in writing."

When insured it was occupied as a family residence by a tenant of the appellee, and the *character* of the house was never changed; but on November 26, 1881, he, together with his family, moved out of it, although his lease would not have expired until in March following; and on December 5, 1881, it was burnt.

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When the tenant removed, the appellee, failing to obtain another tenant immediately, got a man to stay in one room of the house, which was furnished for the purpose, and who ate and slept there, having access to the entire building, for the purpose of caring for and watching it; and he was so doing when it was destroyed.

The policy provided, that if the parties to it differed as to the amount of any loss, it should be fixed by arbitrators, whose written award should be binding upon the parties as to the amount, but should not determine the liability of the appellants therefor.

After proper proof had been made of the loss, the parties, by written contract, submitted the question of amount to arbitrators, who, by an award in writing, fixed it at five thousand six hundred and two dollars and thirty-two cents. The appellants failing to pay the insurance, which was two thousand dollars by each company, the appellant brought these actions upon the policy (a joint one by the two companies), alleging that his loss was ten thousand dollars, and asking judgment in each action for the two thousand dollars. Subsequently, he, by an amended petition, set up the agreement to arbitrate, and the award.

The appellants seem at the outset to have mainly relied upon alleged actual fraud upon the appellee's part; but the testimony disclosing his good faith, the defense mainly urged by them at last in the lower court was, that the policy became inoperative when the house ceased to be occupied by a family, and

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that the words, "occupied as a family residence," constituted a continuing warranty that the house should be occupied by a family during the entire time covered by the policy.

If this be so, however, then the subsequent provision that the policy should become void if the house should "be or become *vacant* or *unoccupied*," was needless. These words mean, without an occupant; and if the words used in giving the description of the property, "occupied as a family residence," imply an undertaking that the house should be occupied by a family during the term of insurance, then we must suppose that the insurers used the subsequent words unnecessarily.

Effect should be given to both, if they can be reconciled, and both be considered in construing the contract; but forfeitures are not favored, and if the language be of doubtful import, it should be construed most strongly against the insurer.

If, under our law, the words "occupied as a family residence" could be treated as a warranty, we think, in view of the subsequent language, it could only be held to be one as to the use of the house *in presenti*; but our statute provides, that "all statements or descriptions in any application for or policy of insurance shall be deemed and held representations, and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." (Gen. Stat., page 918.)

The parties must be considered as having contracted with reference to this statute, which was upheld in the case of the Germania Insurance Com-

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pany v. Rudwig, &c., 80 Ky. Rep., 223, and the statement in the policy, "occupied as a family residence," must be regarded as but a representation as to its *then* use, and the subsequent words as but an undertaking by the insured that the house should not be without an occupant during the time covered by the policy.

The motion of the appellants for a peremptory instruction in their behalf, in the nature of a nonsuit, was based upon a counter view as to the proper construction of the terms of the policy.

It was equivalent to a demurrer to the appellee's evidence; it presented a legal question only, and for the reasons *supra* was properly overruled.

Two questions remain to be disposed of: First, was there within the law any motion for a new trial?

If not, we can not consider the correctness of the special verdict.

Second, if none, then did the special verdict authorize the judgment?

No verdict save a special one was asked, directed or returned; and it was rendered on January 13, 1883. The following is the substance of the facts found:

1. That the house was covered by the policy.
2. That the house, or a portion of it, was occupied up to the time of the fire after the tenant moved out of it.
3. Henry Suter, a negro boy, occupied the house and had access to all parts of it.
4. Suter was employed to occupy it and take charge of it.

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5. Tenant moved out before his term expired.

6. He did not move out with plaintiff's consent.

7. Plaintiff attempted in good faith to get another tenant.

8. The award of the arbitrators was five thousand six hundred and two dollars and thirty cents:

a. Suter occupied a room attached to main house.

b. Suter was not married.

c. Suter occupied said room in charge of the house.

d. Suter occupied it as a family residence.

e. Plaintiff gave no notice to defendant that the house was vacant or unoccupied.

f. Defendant did not consent to said vacancy.

g. There were household goods and furniture in it belonging to plaintiff or to the tenant when tenant left it, or at the time of the fire.

Closing as follows:

"We, the jury, find as above.

"W. C. SMITH, Foreman."

Neither side objected to them; but each moved for a judgment in his and its favor, respectively, upon them.

The court took time and rendered a judgment for the appellee on May 7, 1883, for the amount of the policy. On May 8, 1883, or nearly *four months* after the rendition of the verdict, the appellants filed grounds and entered a motion for a new trial. The appellee objected, and the motion was overruled.

Section 340 of the Civil Code provides: "A new trial is a re-examination in the same court of *an issue of fact* after a verdict by a jury or a decision by the court."

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The expression, "decision by the court," manifestly refers to a case where the facts as well as the law are submitted to the judgment of the court.

Section 342 of the Code says:

"The application for a new trial must be made at the term in which the verdict or decision is rendered; and except for the cause mentioned in section 340, subsection 7 (which did not exist in this case), *shall be within three days after the verdict or decision is rendered*, unless unavoidably prevented."

A motion for a new trial questions the finding of fact alone, whether by judge or jury. If a verdict is complained of as unsupported by the evidence, then it is assailed for the direct error of the jury; but if the complaint be that the court committed an error, for instance in giving instructions, or in the admission of evidence, yet the verdict is assailed as a consequential error. A motion for a new trial does not question the legal conclusion which the court may reach in rendering a judgment. If it be erroneous in not conforming to the verdict or the finding of facts, a motion for a new trial is not the proper mode of correction. It may be reviewed without such a motion, and by merely asking the court to correct it, and the correction would not affect the verdict. A judgment is usually rendered when the verdict is returned into court; but need not necessarily be, even in the case of a general one. If the court is in doubt as to the proper judgment to be rendered, it may wait to be advised. Even if it tries the facts, it may enter its

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decision as to them, and take time as to the law of the case. A party need not delay making his motion for a new trial until the judgment is entered. If the finding of fact be wrong, it is important that the court's attention should at once be called to it; and, therefore, the time within which it may be done has been limited to three days. It is urged, however, that this is requiring a party to jump in the dark; to act without knowing what the court may do. It is a sufficient response to this to say, *lex ita scripta est*; but we see no good reason why a party should be allowed to speculate on what the court may do; and if he does so, why should he not be required, as in numberless other cases, to risk his judgment?

Suppose that a party against whom a general verdict has been returned moves for a judgment in his favor *non obstante veredicto*; the court takes time upon the question and finally overrules the motion, and renders a judgment upon the verdict. In such a case can the plaintiff move for a new trial when more than three days have elapsed from the rendition of the verdict? We think not. The delay by the court in entering the legal conclusion can not extend the statutory period fixed for questioning the finding of fact. The rule upon this point is the same, whether the verdict be a general or a special one. In the latter case it is final as to the facts.

We have been unable to find but one case upon this question.

By the California Code, a notice of a motion for

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a new trial must be given within two days from the *termination of the trial*.

In the case of *Allen v. Hill*, 16 Cal., 113, a special verdict alone was rendered upon **January 14, 1880**. Judgment upon it was reserved until January 20, 1880, and the notice of the motion for a new trial given upon the next day.

It was urged that it was not required that the notice should be given until the completion of the trial; and that it was not complete until the judgment was rendered upon the special verdict; but the court held otherwise, saying:

“It is urged that as the verdict was special it was necessary to invoke the action of the court before a judgment could be entered upon it, and that, therefore, the trial itself did not in contemplation of law terminate until the judgment was rendered. We can not assent to this view. The facts were settled by the verdict, and it only remained for the court to pronounce the conclusion of the law upon the facts found. If the court erred in this respect, the error is a proper subject of review, and a motion for a new trial was unnecessary. If the verdict was not satisfactory, the right to correct it did not depend upon the judgment, and the steps for that purpose should have been taken within the time limited by the statute.”

In this case no question arises as to when the trial terminated, because under our practice the period within which a motion for a new trial must be made dates from the rendition of the verdict.

It is said, however, that there was no verdict

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upon which a judgment could be entered for the appellee; that it found no sum for which one could be rendered; that it should have found the facts, and declared that if upon them the appellee was entitled to recover, then that he was entitled to a certain sum, naming it, or that his damages were so much.

A special verdict at common law was one by which *the facts* of the case were put upon the record; and section 326 of our Code defines it as “the finding of *facts* by a jury as shown in their answers to questions submitted to them in writing.”

It is true that section 327 of the Code, in speaking of it, says, that “on such finding the jury shall return a special verdict only;” but when the two sections are considered together, it is manifest that this only means that when such a verdict is ordered, it only shall be returned.

The petitions allege that the loss or damage was ten thousand dollars; the award fixed it at five thousand six hundred and two dollars and thirty cents, the appellants admitting in their pleadings that the question as to the amount of it was, by agreement, left to arbitrators, but denying that they found the award of five thousand six hundred and two dollars and thirty cents, which issue was, however, settled by the special verdict; the prayer of the petitions is for a judgment for the amount of the insurance, which was less than the amount of the award.

It is earnestly urged that, if the judgment was based upon the special verdict, that then it should

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have been for the amount of the award, instead of the amount of the policy; that the lower court got the amount of the judgment from his own mind, instead of the verdict, beyond which he could not go to get the facts; and that it is the duty of a court in such a case to act upon the verdict as it is and not as it should be. True it is, that in such a case it is the province of the jury to find the facts, and the court to declare the law; and the damages to be recovered must be fixed by the jury, unless only a question of legal construction or a legal issue is involved.

The jury, however, only find facts which are *in issue*. Here the parties agreed that in the event of a loss the appellees should pay not exceeding a certain sum, although the actual damage might be much more.

If the parties had by contract fixed the amount of the damages, and the appellee had alleged it in his petition, then it would govern, and no finding as to it would have been necessary. It would not have been *in issue*. Did they not do what was equivalent to this when they by agreement submitted the question to arbitrators?

The special verdict found that the parties had, by agreement through arbitrators, fixed the entire loss, and it found the amount so fixed. This was before the court, together with the agreement of the parties, binding the insurer to pay a certain sum, which was less than the award.

Under these circumstances the question as to the amount for which the judgment should be rendered was merely a legal one, and involved no issue of fact.

Judgments affirmed.

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CASE 68—PETITION EQUITY—DECEMBER 17.

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APPEAL FROM LOUISVILLE LAW AND EQUITY COURT:

1. **REMAINDERS.**—The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested remainder from one that is contingent.

A devise for life, with remainder to the children of the life tenant, creates a vested remainder in the children, whether or not they are born when the will takes effect. The use of the word "children" makes the persons to take as certain as if the names of the remaindermen had been given. It is otherwise where the word "heirs" is used, unless it can properly be construed to mean children.

2. **SAME.**—The fact that the interest of the remainderman may be divested by his death before the death of the life tenant does not make the remainder a contingent one.

Devise to A for life, remainder to B, but if B is dead at the termination of the life estate then to C, passes to B a vested estate and a contingent interest to C.

3. **THE INTERVENTION OF TRUSTEES** does not modify these rules of construction. The same rules apply as when the conveyance is direct.
4. **CASE ADJUDGED.**—A testator devised real estate to trustees for the use of his daughter, providing that "after her death, or if she die before me, the fee-simple of said property shall be conveyed to her children and their descendants in the same proportion as if it had descended from her; but if she have no child, nor descendant of a child, then to be held in trust for my son." *Held*—That the children of the life tenant took a vested remainder.

JOHN MASON BROWN AND GEORGE M. DAVIE FOR APPELLANT.

Brief not in record.

JAMES S. PIRTLE AND A. P. HUMPHREY FOR APPELLEE.

Brief not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the Louisville Law and Equity Court, dismissing appellant's petition. vol. 88.—81

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116	658
83	481
117	181
116	633
83	481
123	620
83	481
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tion. The right to the relief sought depends upon the construction given certain provisions of the will of Charles W. Thruston. The mother of the appellee's assignors was a daughter of the testator.

By the first clause of the testator's will all of his estate, real and personal, was devised to A. J. Ballard and John R. Churchill, in fee-simple, upon the trusts and for the uses therein expressed.

A farm owned by the testator was devised to his son, Samuel C. Thruston, during his life, or the use of it. The will provides: "But my said son is to have only the use thereof during his life for the maintenance of himself and family, and no part thereof shall be liable for his debts, nor shall he have the power to alienate, etc. After his death, *or if he die before me*, the fee-simple of said property shall be conveyed to his children, if he leave any, and their descendants, in the same proportion as if it had descended from him; but if he leave no children, or the descendant of a child, the same shall be held in like manner for the support, use and benefit of my daughter, Frances Ballard, during her life, as in the next clause directed, and after her death, or if she then be dead, to be conveyed to her children and their descendants, in the same proportion as if it had descended from her."

As to the property devised directly for the use of Mrs. Ballard, the will provides: "After her death, *or if she die before me*, the fee-simple of said property shall be conveyed to her children and their descendants, in the same proportion as if it had descended from her; but if she leave no child, nor

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descendant of a child, then to be held in trust for my said son Samuel and his descendants, as in the second clause ~~therein~~ directed."

By the seventh ~~clause~~ of the will, the testator provided that if both his son and daughter died without issue living at their death, the testator's estate was to pass to certain collateral relations. The son, Samuel Thruston, died before the testator. Mrs. Ballard is still living, and has three children, Charles, Samuel and Rogers Ballard.

Charles and Samuel Ballard were *in esse* at the death of the testator, and have conveyed their interest in their grandfather's estate, whatever that may be, to the appellee. The question presented is: Did the estate devised to these children vest in them at the death of their grandfather when the will became operative, or was it a purely contingent interest, to take effect upon their surviving their mother, the life tenant. If a present interest, the deed of assignment made for the benefit of certain creditors to the exclusion of others must inure to the benefit of all. The Chancellor below held that they took no such interest, and dismissed the petition.

The case of Williamson v. Williamson, reported in 18 Ben Monroe, 329, seems to have been the authority upon which this case was determined. The devise in Taylor's will was: "The tracts or lots which I give to my daughters they are to have, hold and enjoy the rents and profits of the same for their separate and sole use during their natural lives, and at their deaths the title to the same is to vest in their heirs in fee forever."

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Mrs. Williamson, at the death of the testator, had nine children, two of whom died under twenty-one, and without issue. Mrs. Williamson and her husband conveyed the life interest of the wife in two-ninths of the property to Wills, who reconveyed the same to Williamson. Williamson, claiming as heir of his two children their remainder interest, and the life estate of the wife in two-ninths of the estate, brought his action for partition. The question was, whether a vested interest passed to the children during the life of the mother, the life tenant. The court distinctly held in that case that the rule distinguishing a vested from a contingent remainder could not operate as a test, because the estate in remainder had been given to the heirs of the same person, who was the devisee for life. The court, however, applied a test in that case in this manner: Suppose A be the devisee for life, with remainder to the heirs of B, and then apply the rule whether during the life of B the remainder would vest in his heirs or be contingent. "In such a case," says the court, "if the possession were to become vacant by the death of A prior to the death of B, the estate in remainder could not take effect in possession, because during the life of B there would not be any person that could properly, and, technically speaking, sustain the character of his (B's) heir, and, therefore, the limitation in remainder would fail, the death of B in the life-time of A being the contingency on which it depended."

It is true that the remainder would take effect in the devise referred to if the possession was to

become vacant by the termination of the life estate, "but it would become (to use the language of the court) the event which determined the life estate, resolved the contingency, and rendered that certain which was before uncertain," and the estate in remainder would, therefore, be contingent and not vested. As in the test given, the death of B must occur before you could know who were his heirs, and the death of Mrs. Williamson, the life tenant, must happen before her heirs could be ascertained. It was for that reason and no other that the devise was held in that case to be a contingent remainder.

The case of *Johnson v. Jacob*, 11 Bush, 646, followed the case of *Williamson v. Williamson*. The will of Isaac R. Jacob read:

"After his death the property, with the unexpended avails, shall be conveyed and paid to his descendants, if there be any such then living. *"

* * If there be no such descendants, then the same shall be paid and conveyed to his heirs." Isaac R. Jacob died without descendants, and it was held that the interest of his brothers and sisters (who were his heirs) was contingent. This court said:

"It being impossible to ascertain what persons would fall within this description until the death of the life tenant, this would seem to be a case in which the remainder was undoubtedly limited to persons not ascertained, and some of whom were not *in esse* when the limitation was made."

Here again the event which renders the possession vacant also resolves the contingency upon which

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the limitation depends, and makes that certain which was before uncertain.

The MS. opinion in the case of *Mary Tyler v. Thomas P. Jacob* (Feb. 1, 1833) involved the question as to whether the purchaser obtained a title by the conveyance tendered by Mrs. Tyler and her children. This court held that if one of the children of Mrs. Tyler should die leaving children, those children living at the death of the life tenant (their parent being dead) would take under the will, and the conveyance by the parent in his or her life-time would be a nullity.

The death of the child before the life tenant, leaving children, created the contingency upon which the purchaser would be deprived of title. It was clear in that case that a perfect title could not be made. It is true that, in the opinion, it is held that no interest vested in the children; but such was not the decision in *Johnson v. Jacob*, upon which that declaration was based. The case of *Wilson v. Graham*, another MS. opinion as to the character of the title, is somewhat similar. There the sale was for a reinvestment of the property, and the conveyance was "to Sally McCready, and to such child or children she may have by the said George McCready at the time of the death, or to the descendants of any such." It is evident that here was a vested interest in the child, subject to be defeated by the death of the child before the mother, and that was the only contingency arising from the conveyance. Whether that was such a contingent estate as might be sold under the statute by the

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life tenant without making the child a party, is not necessary to be determined. The statement that this child or children, in either case found in the MS. opinions, took only a contingent interest, can not be sustained upon principle or by authority.

In the case of *Feltman v. Butts*, 8 Bush, 115, the devise reads: "I now give the said lot to my brother, Samuel Butts, during his life, and after his death I will said lot to his heirs." This could not have been a vested remainder unless there were facts upon the face of the will showing that the word heirs was used by the testator in the place of and for children.

So that the MS. opinions of *Tyler v. Jacob* and *Wilson v. Graham* are not authority for the appellees, nor the case of *Feltman v. Butts* authority for the appellant.

It is proper to refer to some elementary rules distinguishing a vested from a contingent remainder. The mere fact that an estate is to take effect and be enjoyed after the termination of an intervening estate will not prevent both estates from being vested at the same moment, and also an estate may vest in one subject to be divested in favor of another. Chancellor Kent says:

"It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment which marks the distinction between a vested and contingent interest." (Kent's Commentaries, vol. 4, p. 206.)

"The present capacity of taking effect in possession, if the possession were to become vacant,

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and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." (2 volume Chitty's Blackstone, 169, note 10; *Walter v. Crutcher*, 15 B. M., page 10.)

"There can be no question that the tendency of the more recent decisions is clearly in favor of holding an estate in remainder vested where that can be fairly done without too great violence to the language used." (Redfield on Wills, volume 2, 232, 3d edition.)

With these elementary rules before us, the case under consideration can be readily distinguished from the cases of *Williamson v. Williamson*, 18 B. M., 329, and *Johnson v. Jacob*, 11 Bush, 646, in each of which the remainder was held to be contingent. The devise in the case before us is: "After her death (the daughter, Mrs. Ballard), or if she die before me, the fee-simple of said property shall be conveyed to her children and their descendants, in the same proportion as if it had descended from her; but if she leave no child, or descendant of a child, then to be held in trust for my said son Samuel and his descendants."

These children were in being at the death of the testator, and if the mother had died before the testator, by the express provision of the will would have been entitled in fee to the devised estate; but the mother surviving the children, became entitled to the remainder interest, to be possessed and enjoyed by them at her death, but subject to be

divested of that interest in the event they died before the mother, the life tenant. It is a plain devise to the mother for life, remainder to her children; and if they should die, or either of them, before the mother, the interest of the one dying to go to his children, if any, etc.

The present capacity of these children to take the possession existed from the moment of the testator's death, in the event the life tenant had died. There was no uncertainty of the right of enjoyment, because the objects of the devise in remainder were in existence and could take; but there was an uncertainty of enjoyment in the future, because the remainderman might die before the life tenant.

A devise to A for life, remainder to B, but if B is dead at the termination of the life estate then to C, passes to B a vested estate, and a contingent interest to C. This is the same character of devise, and the fact that the title is held in trust can make no difference.

The use of the estate for life, or the right to the rents and profits for life, with the legal title in trustees, with the direction to the latter to convey to the children, or such of them as are living at the death of the life tenant, vests the children with an equitable fee. "The same rules of construction apply whether the conveyance is direct or through the intervention of trustees." (2 Redfield on Wills, page 225.)

Mr. Redfield, citing the case of *Browne v. Browne* (3 Sm. & Gif., 568), says: "In this case the devise was to trustees for the use of A for life, remainder

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to all and every of his child or children who shall attain twenty-one, as tenants in common in fee, with an intermediate limitation, and then over. It was held that upon the death of A, leaving one child, an infant, such child took a vested estate in fee-simple, liable to be divested upon his dying under twenty-one." (2 Redfield on Wills, 231.)

In *Randall v. Doe* (5 Dow, 202): "A devise to the children of testator's nephew as tenants in common in fee, but if such nephew should die without issue, or such issue should die under twenty-one, then over, all the children of such nephew living at his decease, although not of full age, took vested interests, liable to be divested by their decease before twenty-one." (Redfield on Wills, page 272, note, 3d ed.)

Suppose you insert in the will of Taylor, which was the subject of construction in the case of *Williamson v. Williamson*, the word children instead of the word heirs, could there then be any doubt but what the father of the deceased children of Mrs. Williamson would have inherited their interest in the devised estate? Yet the court, in that case, recognizing the rule that the law favors that construction of a devise which will cause the interest to vest, held that the word heirs, having both a legal and popular meaning when used alone, when there was nothing going to show that it was not used in its legal sense, it must be understood as having been so used, and the test given by the court in that case shows conclusively that as there could be no heirs of the life tenant during her life, there was no one

in being in whom the remainder could vest; and this doctrine was fully recognized and followed in *Johnson v. Jacobs*, 11 Bush, 646. A vested remainder creates a present interest in the remainderman, and there being no one during the life of Mrs. Williamson to hold the fee in remainder, no present interest could exist. There is no analogy between those cases and the provisions of the present will. Here the remaindermen are designated by the will and in existence, ready to take the possession whenever the life estate terminates.

In the case of *Williamson and Others v. Fields' Ex'rs* (2 Sand. Ch., 533), it is held, "when the person to whom a remainder, after a life estate is limited, is ascertained, and the event upon which it is to take effect is certain to happen, it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the termination of the particular estate."

In the case of *Carver v. Jackson*, 4 Peters, 1, in a deed evidencing a marriage settlement, the following grant was made: "to the use and behoof of the said Mary Phillips and Roger Morris (her intended husband) during their natural lives, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her or their heirs and assigns forever." This, said the court, "is a clear remainder in fee to the children of Roger Morris and wife, which ceased to be contingent on the birth of the first child, and opened to let in after-born children."

The reason it became a vested interest was the

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birth of a child in whom the remainder interest could vest. The estate was contingent until the birth of the children, and in that case the rule is again recognized that limitations of this nature shall be construed to vest when and as soon as they may vest.

It is not necessary that the children should be mentioned by name, when living, at the death of the testator, in order to vest the title; and whether born or not when the will takes effect, the word children makes the person to take as certain as if the name of the remainderman had been given.

In *Wight v. Shaw*, 5 Cushing, 56, the devise was "to my son during his natural life, but if he marry and have children, then at his death to his children lawfully begotten and their heirs forever." It was held that the daughter of the son took a vested estate. Authorities might be multiplied on this subject, but we are satisfied that the weight of authority as well as reason favors such a construction of this will as will give to the children of Mrs. Ballard a vested interest in the estate devised to the mother as soon as the will of their grandfather took effect. There has been no period since the death of the maternal grandfather of these appellees that they could not have possessed and enjoyed the remainder, if the precedent estate had ended; the word children leaves no ambiguity as to who are the remaindermen.

These remaindermen may be divested of their interest by their death before the life tenant, and this would be at the risk of the purchaser accept-

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ing a title from the children now in being, as in the case of *Mary Tyler v. Jacob*. This is the only contingency we perceive in this case the happening of which must terminate their right.

The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

[This opinion was not marked for publication when delivered. It is now published by direction of the court.]

CASE 69—PETITION EQUITY—MAY 22, 1884.

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APPEAL FROM FAYETTE CIRCUIT COURT.

1. **TRUSTS—LIMITATION.**—When a trustee, in whom is vested the legal title to land, is barred by limitation, the *cestui que trust* is also barred, although he be an infant.
2. **ACCEPTANCE OF TRUST.**—Where a trustee, empowered by the will under which he received his appointment to name his successor, appeared in an action instituted by him for the purpose of resigning the trust, and exercised the power thus conferred upon him, no further proof of his acceptance of the trust ought to be required after a great lapse of time.
3. **PARTIES TO ACTIONS.**—Where a will conferred upon a trustee under it the power to name his successor, the *cestui que trust* was not a necessary party to an action by the trustee to have a successor appointed.

BRECKINRIDGE AND SHELBY FOR APPELLANTS.

Brief withdrawn.

W. LINDSAY FOR APPELLEES.

1. The third clause of the will invested the three trustees with the legal title to, and the absolute control over, the estate for the purposes of the trusts created; and the title to the realty, and the power

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and duty of controlling it, remained in the trustees, the survivor and his successor. (Perry on Trusts, sections 305, 343; Clark v. Anderson, 10 Bush, 108; Rev. Stat., chapter 80, section 14.)

2. In cases like this, nothing appearing to the contrary, the acceptance by the nominated trustee will be presumed. (Perry v. Davis, 3 B. M., 314.)
3. The infant *cestui que trust* was not a necessary party to the action by the trustee to be relieved of the trust, and to have a successor appointed. (*In re Robinson*, 37 N. Y., 261.)
4. The right of action is in the trustee of an express trust. The beneficiaries may be proper but are not necessary parties. (Civil Code, section 21; Meador v. Mitchell, 5 Abbott's Prac. Reports, 105, 106.)
5. When the statute of limitations bars the trustee of an express trust, it also bars the beneficiaries. (Coleman v. Walker, 8 Met., 65; Edwards v. Woolfolk, 17 B. M., 381; Williams v. Otey, 8 Humphrey (Tenn.), 569; Woolfolk v. Planters' Bank, 1 Sneed (Tenn.), 297; Perry on Trusts, section 358; Angell on Limitations, section 473.)

And this when beneficiaries are infants and lunatics. (Weaver v. Lennan, 52 Md., 708; Crook v. Glenn, 30 Md., 55; Moulton v. Henderson, 62 Ala., 426.)

JAMES H. MULLIGAN ON SAME SIDE.

1. From December, 1860, the possession of H. B. Barclay and James Barclay was adverse to the trustees and all other persons, and from that time the statute of limitations began to run, and continued to run in favor of the Barclays and their vendee, and in fifteen years barred the trustee, *cestui que trust* for life and those in remainder. (Smilie v. Biffle, 2 Barr (Pa.), 152; Crook v. Glenn, 30 Md.)
2. The legal estate of the trustees being barred, the equitable estate of the *cestui que trust* is also barred. (Edwards v. Woolfolk, 17 B. M., 381; Coleman v. Walker, 8 Met., 66; Angell on Limitations, section 478 and notes; Tyler on Ejectment and Adverse Possession, page 382.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

John L. Barclay died in April, 1860, testate, leaving surviving him a widow, daughter and two sons, Herman B. and James C. Barclay.

By his will he devised all his estate, real and personal, of whatever kind, to James M. Barclay, John Jackson and John B. Tilford, in trust, for the purposes therein specified, with authority to appoint

their successors, and in case of the death or resignation of either of them, the survivors or survivor to have the power to name successors.

He directed his residence to be sold, and another purchased for his wife to suit her, when and where she might wish, of less value, and power was also given to the trustees to sell any of his servants, with the consent of his wife. Subject to the right of his wife to retain whatever thereof she might wish, he directed the sale of his furniture, horses, carriage, and all personal property pertaining to his residence.

By the sixth clause of his will he directed the trustees to invest all the proceeds, not provided for the payment of his debts and the comfortable establishment of his wife, in notes secured by liens on real estate, or if such loans could not be obtained, the trustees had discretion to invest otherwise.

By the seventh clause he directed that the income of his estate, invested as above directed, should be for the use and benefit, during their natural lives, of his wife, daughter and two sons in the following manner: Five hundred dollars to be paid annually by the trustees to and for the use and benefit of his son Herman B. during his natural life, and six hundred dollars to be paid in the same manner and for the same time to his son James C. Barclay. The balance of the income of his estate, he directed to be appropriated to the use and benefit of his wife and daughter during their natural lives, and if any part of the income designated for his wife should not be used for her and daughter, the trustees were directed to invest the overplus.

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The thirteenth clause of the will is as follows: "I direct that after the death of my wife and my daughter Fanny, my estate shall be held in trust for the benefit of the children of my sons and daughter, should they have any, and until such children shall be twenty-one years old, and then equally divided between and among said children."

The widow and daughter both died after the testator, during the year 1860, the latter without having been married, and childless.

In July, 1861, the two sons, Herman B. and James C., the latter being then a minor, and suing by his next friend, instituted an action in the Fayette Circuit Court against the trustees, claiming that as their mother and sister had each died before any grandchild was born, the contingent remainder to the grandchildren was defeated, and that they were entitled in their own right to the whole of their father's estate, except so much as might be necessary to raise the annuities payable to themselves.

The trustees were each duly served with process, but did not file of record any answer to the petition, though an answer by them appears to have been placed amongst the papers of the action.

Herman B. Barclay had married previous to the commencement of that action, but after the death of his mother and sister, and had a child, Alex. B. Barclay, born while it was pending, and before judgment, but he was not made a party thereto.

March 1, 1862, a judgment was rendered in that action as follows: "That upon the deaths of the widow and daughter of the testator, John L. Bar-

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clay, their being no grandchildren of testator in existence, born or unborn, at the time the trust for the benefit of the widow and daughter terminated, the property, money, etc., held and devised to the defendants as executors and trustees in trust for said widow and daughter passed by operation of law to the plaintiffs as the sole heirs and distributees of the testator, and that no trust arises concerning said property upon the subsequent marriage of plaintiff and the birth of a child."

It was farther adjudged that the defendants to the action, "after payment of the debts of testator and charges of administration, and reserving a sufficiency to produce the annuities bequeathed to plaintiffs, pay and deliver to them all the residue of testator's estate, only paying, however, the share of J. C. Barclay, which is one equal half, to his statutory guardian, or to himself on his arriving at age."

In July, 1863, H. B. Barclay and J. B. Tilford, acting as agent for John L. Barclay's representatives, sold the residence of the testator to W. C. Goodloe for the consideration of ten thousand dollars, and in August, 1864, a deed was executed for the property by H. B. and J. C. Barclay in proper person.

It appears that Goodloe took possession of the property in 1863, and held it continuously and adversely until his death in 1870, when he died, devising it to his wife, Almira Goodloe, appellee, who has so held it ever since.

In 1864, Goodloe, the purchaser, instituted an

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action in the same court, for the purpose of obtaining a conveyance of whatever legal title might be in the trustees under the will of John L. Barclay, and by judgment rendered in that action such conveyance was directed to be made.

In November, 1865, Jackson, the only surviving trustee under the will, filed a petition in the same court, making the two sons of the testator parties defendants for the purpose of resigning his trust, and a judgment was rendered in pursuance of his prayer, appointing H. B. Barclay trustee in his place, who executed bond for the faithful discharge of his duties as such.

James C. Barclay died in 1879 intestate and insolvent, leaving two children, appellants, born subsequent to 1865, who, by their next friend, commenced this action March 7, 1879, to recover of appellee, Almira Goodloe, the property designated in the will as the testator's residence, and which, as before mentioned, was conveyed to W. C. Goodloe in August, 1864, by H. B. and J. C. Barclay. Alex. B. Barclay, son of H. B. Barclay, was made a defendant to the action, but does not appear to be a party to this appeal.

For her defense to the action, appellee alleged in her answer the want of title in appellants to the property in contest, and also pleaded and relied upon the statute of limitation.

It appears that Tilford, one of the trustees, disclaimed his trusteeship, and James M. Barclay, another one, died about 1862 or 1863, leaving Jackson the only survivor.

Counsel for appellant contends that there is not sufficient evidence that Jackson ever accepted the appointment or took upon himself the duties of trustee under the will.

We think there is sufficient evidence to show that he did accept the trust, and acted under his appointment; but to what extent does not clearly appear. He did, however, in 1865, appear in the action brought by him in the character of trustee, and exercised the power conferred upon him by the will to designate H. B. Barclay as his successor. Having thus assumed and claimed the rights conferred upon him as such trustee by the will, we think it unnecessary to require after such lapse of time any farther proof of his acceptance of the trust. (*Penny v. Davis*, 3 B. M., 313.)

Nor do we think it was necessary for him to make the only grandchild of the testator then living a party to the action instituted by him in 1865 for the purpose of having a successor appointed. The will conferred upon him the express power to name his successor, and by virtue of the order of the Chancellor appointing H. B. Barclay, who was designated by Jackson as the person he wished appointed, Barclay became in all respects a trustee under the will.

There having been an acting trustee from the death of the testator, and an adverse holding by appellee and her husband, under whom she claims, for more than fifteen years next before the commencement of this action, has the disability of appellants prevented the statute of limitation from running?

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This question having heretofore been passed upon and decided by this court, it is unnecessary to enter into an extended discussion of the subject. It has been decided expressly that the legal estate which is vested in a trustee, together with the equitable interest dependent upon it, may be defeated by the statute of limitation; and this though the *cestui que trust* be an infant. (Edwards v. Woolfolk's Adm'r, 17 B. M., 376.)

The property in contest in this case was purchased by Goodloe from the two sons of the testator, and was thereafter held adversely as well to the trustees under the will as to the grandchildren of the testator.

We perceive nothing in the circumstances of this case authorizing it to be excepted from the settled rule heretofore adopted by this court.

There is nothing showing the purchase by Goodloe to have been fraudulent or unfair; but, on the contrary, he paid a fair and full consideration to the two sons of the testator.

Under the will the trustees had the authority to sell the property purchased by Goodloe, and it was manifestly the intention and desire of the testator it should be sold, and the proceeds invested by the trustees.

It is true it was sold by the two sons instead of by the trustees, but one of the sons became a trustee afterwards, and was responsible to appellant for the proceeds of the sale.

But it is not necessary to decide whether that would be sufficient to prevent a recovery of the property, as we think the statute of limitation is an available defense.

The judgment must be affirmed.

DECISIONS
OF THE
COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1886.

CASE 70—PETITION EQUITY—JANUARY 7, 1886.

Short v. Galway, &c.

APPEAL FROM KENTON CHANCERY COURT.

1. **CONFLICT OF LAWS—STATUTORY LIENS.**—While a right created by contract valid by the laws of the State where it is entered into, or a right accrued by reason of a statute, will ordinarily be enforced by the courts of another jurisdiction, yet where the statute of another State creates a lien on the estate of the husband for the protection and support of the widow after his death, the widow can not, as against the heir, enforce that lien on the real estate of the decedent in this State, as to allow this would be to permit the statute of another State to alter our laws of descent.
2. **THE JUDGMENT OF A COURT OF ANOTHER STATE** declaring the existence of a lien on real estate situated in this State will not be enforced here.
3. **JUDGMENTS—UPON WHOM BINDING.**—Under the statute of Ohio, which provides for an allowance by the probate court to the widow of a decedent for a year's support, and makes it a lien on the real estate of the decedent, an heir who was not a party to the proceeding in which the allowance was made may question the propriety or the amount of the allowance.

M. J. DUDLEY FOR APPELLANT.

Brief not in record.

W. H. MACKOY FOR APPELLEE.

1. The heir or devisee may be sued in equity for any *liability* of the decedent. (Gen. Stat., chapter 44, article 1, sections 9 and 10.)

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2. The widow's claim under the Ohio statute is a debt of the estate, to be paid out of the assets the same as other debts. (Rev. Stat. of Ohio, sections 6028, 6040, 6041, 6048, 6090 and 524; Constitution of Ohio, article 4, section 8; Collier v. Collier's Ex'rs, 3 Ohio St., 369 and 376; Spangler v. Dukea, 39 Ohio St., 642; Dorah's Adm'r v. Dorah's Ex'r, 4 Ohio St., 292; Bane v. Wick, 14 Ohio St., 506, 513; Allen v. Allen's Adm'r, 18 Ohio St., 234; Watts v. Watts, 38 Ohio St., 480, 491.)
3. Where a right has accrued by virtue of an act done in pursuance of a statute of another State, and a suit is brought here to enforce the right, the law of that State, as expounded by her courts, will be regarded as the law of the case. (Boyce v. Nancy, 4 Dana, 236; Beard's Ex'r v. Basye, 7 B. Mon., 144, 147; Wadsworth v. Henderson, 4 Ky. Law Rep., 1008; Gibson v. Sublett's Ex'r, 6 Ky. Law Rep., 645; Dennick v. R. R. Co., 103 U. S., 11; Morawetz on Private Corporations, sections 610 and 611; Lowry v. Inman, 46 N. Y., 119; *Ex parte* Van Riper, 20 Wend., 614.)
4. Appellee is entitled, by the law of comity, to maintain her action in this State, as the enforcement of her claim is not forbidden by any statute of this State, nor is it repugnant to the policy of the State, or prejudicial to its interest. (Gen. Stat., chapter 31, section 11, subsection 5; Phoenix Ins. Co. v. Commonwealth, 5 Bush, 69 and 77; Story on Conflict of Laws, page 37; Kendall and Wife v. Coons, 1 Bush, 530; Beard's Ex'r v. Basye, 7 B. Mon., 144, 147; Mitchell v. Word, 64 Ga., 208.)
5. The jurisdiction of the foreign court having been established, the judgment in favor of appellee, so far as the estate of the decedent is concerned, is *prima facie* evidence that it is in accordance with law, and binding until legally impeached or reversed. (Biesenthall v. Williams, 1 Duvall, 331; Grignon's Lessees v. Astor, 2 How., 319.)
6. The judgment in favor of appellee is entitled to the same force here as in Ohio. (Fletcher v. Ferrel, 9 Dana, 380; Rogers v. Rogers, 15 B. M., 379; Rankin v. Barnes, 5 Bush, 20.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Mary V. Mitchell, the widow of William C. Mitchell, after his death married one Galway, and the two, husband and wife, instituted the present action in the court below against the appellant. Charles W. Short, who was the sole heir-at-law of William C. Mitchell, the first husband. Her marriage with Mitchell took place in the city of Cincinnati in

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July, 1873, and at the time of her husband's death they were residents of and domiciled in the State of Ohio.

After Mitchell's death his wife (now Mrs. Galway) qualified as the administratrix of his estate in the Hamilton County Probate Court of that State. She had no children by her first husband, and by the laws of Ohio the appraisers of the estate, when there is not sufficient personal property, are required to set off or fix upon a sum of money for the support of the widow for one year. The personal property was of the value of fifty dollars, and the appraisers allowed her the sum of four thousand dollars for the year's support, and that allowance was approved by the probate court.

The widow then filed a petition in the probate court, in which she set forth the amount allowed her by the appraisers, and that her husband died seized of real estate in the cities of Louisville and Covington, in the State of Kentucky, and by the law of Ohio she could reduce her claim to a judgment, and was entitled to subject the real estate in Kentucky to the payment of the allowance—that the claim is a preferred claim for which she asks judgment. The probate court confirmed the allowance to the widow, and adjudged “that the said Mary Mitchell recover from the assets, real and personal, of said estate, the sum of four thousand dollars, and the same is declared to be the first and best lien and charge against the said estate of said intestate.”

It is alleged and not denied that by the law of

the State of Ohio the widow has a lien for the allowance to her on both the real and personal estate left by the intestate.

The appellant inherited from his half brother (the husband of the appellee) the real estate in the State of Kentucky, and there being no estate of any kind owned by the intestate in the State of Ohio, his widow and administratrix instituted this action in the Kenton Chancery Court to subject the real estate in Kentucky to the payment of this allowance made by the probate court of Ohio. The Chancellor below subjected the realty, and his right to do so is the principal question involved in this case.

Counsel for the appellee bases his right of recovery upon the alleged ground that the allowance to the widow was a debt against the estate of her husband, and the right to this allowance having been created by the statute of Ohio, the courts of Kentucky should enforce it. It is also insisted that it is a right growing out of and incidental to the marriage contract, and for that reason the judgment below should be sustained.

Again, that the probate court of Ohio having adjudged the allowance to the widow to be a valid claim, the courts of this State have no power to revise that judgment.

If the probate court of Ohio had jurisdiction to render such a judgment—and that can not well be questioned in the present state of the pleadings—that judgment is binding as to the amount of the allowance on all the parties properly before that court; but it can not affect those who were not par-

ties to the proceeding. It is not pretended that appellant was a party to this proceeding in Ohio by the widow, either in her own right or as the personal representative of her husband, and, therefore, the question as to the propriety of the allowance may be raised by the answer of the defendant, when his estate is sought to be subjected to its payment; but the issue to be considered here is, "Can the appellant assert her claim against the real estate of the appellant derived by descent from her husband?" The statute of Ohio gives to her as his widow a lien on all the estate, *real and personal*, of the intestate for her support for one year, and it may be called a claim against his estate, for by the statute conferring the right she has a preference over ordinary creditors, perhaps all creditors.

We shall assume not only that the probate court of Ohio had jurisdiction to make the allowance, but that by the statute of that State the appellant could have subjected the real and personal estate of the intestate within the jurisdiction of the courts of that State to its payment, and at the same time it is manifest that no proceeding by the courts of Ohio could create a lien on appellant's land in Kentucky. (Paige, &c., v. McKee, 3 Bush, 135.)

The entire claim of the appellee springs from the marital relation and vested in her, by reason of the statute of Ohio, she surviving the husband, as much of his estate, whether real or personal, as would support her for the period of one year. It became a fixed interest in her husband's estate in the event she survived him, as much so as her interest as

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dowress or her right to share in the distribution of the personalty. The statute, in fact, gave her a sufficiency of the real estate of her husband, or the right to subject so much as might be necessary, which is in effect the same, to satisfy the allowance. This allowance is regarded in Kentucky as a part of the expenses of administration, the widow being allowed before distribution certain specified articles, and if they are not on hand their equivalent in other stock if on the place; if not, so much money; if no money on hand, there can be no resort to the real estate. The widow is entitled to dower in the realty, and the infant children, if any, inherit it from the father, subject to the mother's dower or to the right of homestead.

The difference between the Kentucky statute and the statute of Ohio is, that by the former there is no lien on the real estate, nor can it be subjected, while in the latter the real estate is as much liable as the personalty, or may be subjected if there is no personalty to satisfy the claim.

The courts of Kentucky are called upon to enforce a claim created by the statute of another State that enlarges the costs of administration, and affects the status of the realty cast by descent on the heir as regulated by our statute.

A right created by contract valid by the laws of the State where it is entered into, or a right accrued by reason of a statute, will ordinarily be enforced by the courts of another jurisdiction. (*Boyce v. Nancy*, 4 Dana, 236; *Beard's Ex'r v. Basye*, 7 B. M., 133.)

The right of the wife to her own property, given her by the laws of the State where the marriage took place, will be maintained as against the claim of the husband in a litigation in the courts of this State, although the law of this State would give the property to the husband, if the marriage had taken place here; but this rule does not apply in reference to the interest of the wife in the estate of the husband. The mode of descent, the costs of administration, the right of distribution, will depend upon the domicile of the parties or the situs of the property.

The marriage having taken place in Ohio, and that being the domicile of the husband at his death, the law of that State governs as to all movable or personal property; but real property must be left to be adjudged by the *lex rei sitæ*, and not within the reach, says Story, of any *extra territorial law*. (Story's Conflict of Laws, page 142.)

The right, therefore, given by the statute of Ohio to the wife at the time of her marriage with Mitchell to one half of his real estate, if such was the law, in the event she survived him, would not be enforced by the courts of this State, nor would the right acquired by the wife to enforce her claim for an allowance, in the event she survived her husband, against his real estate, be enforced, because by the law of this State the land passes to the heir free from any such incumbrance, and if permitted to enforce such a lien by reason of the law of another State, it would, in effect, be giving to the wife an interest in the land; for if she can subject

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it because of a claim existing alone by reason of the marital relation, independently of any express contract, the statute of another State might give to her such an allowance as would swallow up the entire realty passing to the heir, although located in another jurisdiction. The statute of Ohio might provide that, in case of intestacy and dying without children, the widow should have not only the year's support, but a sum equal in value to one half of the realty left by the decedent to constitute a lien upon the entire estate until payment. To enforce such liens in this State would be to change the course of descent, and take from the heir his lawful inheritance.

As in this case the widow is allowed four thousand dollars for her support for one year, which is five times the sum in value that is allowed the widow in this State, it is a lien by the law of Ohio on the real as well as the personal estate, and can be enforced; but when undertaking to deprive the heir in this State of the inheritance by such a proceeding, you permit by indirection the law of another State to control or determine the laws of descent in subjecting the realty, not by reason of any express contract, but because of the rights of a party created by the statute of another State, springing solely from the marital relation. If personal estate, the judgment might be enforced, because that passes by the law of the domicile, and the courts of this State, if called on, would consult the Ohio statutes and the decisions of the courts of that State in determining the rights of the parties.

The case of *Mitchell v. Word*, *Guardian*, reported in 64 Georgia, 208, does not sustain the views of counsel for the appellee or the judgment below.

In that case the intestate died in Florida, owning real and personal estate in Georgia. The widow removed from Florida to Georgia after the husband's death, and brought suit in the latter State for her year's support. The court entertained the action, and adjudged that the law of Florida as to the amount she was entitled for her support must control. This was the only question involved, and, in the bill filed by the widow, she insisted only that the intestate, having been domiciled in Florida at the time of his death, the personal estate of the intestate in Georgia must be administered according to the laws of Florida; that is, the mode of distribution must follow the law of the domicile. The judgment in the State of Ohio does not prevent an inquiry as to the jurisdiction of the court rendering it either as to the person or the subject-matter determined by it. If the subject-matter is real estate, a judgment of the *forum rei sitæ*, affecting the right and title, is to be held of universal obligation, says Story, and, on the other hand, a judgment of a foreign country in regard to it will be held of no obligation. (Story's *Conflict of Laws*, page 494.)

The judgment of the probate court in the present case is but a declaration of the statute of Ohio as to what the widow shall be entitled to for her year's support after the death of her husband, and is valid and binding because the law of the domicile determines that question; and so would a judgment

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determining the mode of descent and distribution, except as to realty outside of the jurisdiction. A judgment by the courts of Ohio determining a course of descent affecting land in Kentucky different from the law of this State would be a nullity, and so of a judgment determining the existence of a lien on realty here for the purpose of satisfying the claim of the widow for her share in the distribution or for her yearly support. The claim, whether called a debt or connected with the expense of administration, is derived alone from the fact that she is the widow of the intestate. The statute gives it to her as it does an interest in the distribution of the personal estate or in the realty. It all springs from the marriage relation, and the law of the domicile of the husband regulates the interest of the wife in the personal estate left by him and also of the real estate, unless located in a different jurisdiction. To say that the law of the domicile may make the heir liable to the extent of the real estate descended, located in a different State, to satisfy what the widow has failed to get in the distribution or for her support for one year or longer, would, in effect, subject the manner of inheritance to the law of another forum than that in which the realty is located.

Here the Chancellor is asked to enforce this claim of four thousand dollars against the land in the possession of the heir-at-law, and then to give to the widow, or leaving her entitled to dower in the remainder. This was not a debt against the husband or created by him, and is enforced because in-

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cidental to the marriage contract. Her right to one half the real estate left by her husband (if such was the law of the domicile) should be enforced in Kentucky for the same reason.

Incumbrances created by the statute of another State, from motives of public policy only, on the estate of the husband for the protection and support of the widow after his death, will not be enforced in this State as against the heir by subjecting the real estate descended to its payment. It is not only contrary to the policy of this State, but if enforced must take from the heir his rightful inheritance.

Judgment reversed, and the cause remanded with directions to dismiss the petition.

CASE 71—PETITION ORDINARY—JANUARY 12.

Wilsey v. L. & N. R. R. Co.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

1. **RAILROADS—REASONABLE REGULATIONS.**—A regulation of a railroad company, whereby passengers who pay their fare upon the train are required to pay a higher rate than those who purchase tickets before entering the cars, is reasonable, and the company will be protected in its enforcement.
2. **RIGHT TO EJECT PASSENGER FROM TRAIN.**—Where the conductor of a train demands of a passenger a higher rate of fare than he is entitled under the rules of the company to demand, the demand is illegal, and the company is responsible if the conductor ejects the passenger for his refusal to comply.
3. **"STOP-OVER" PRIVILEGE.**—As a general rule, when a passenger who holds a ticket from one point to another selects his train and

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enters upon his journey, he has no right to leave the train at a way station, and afterwards enter another, and proceed to his destination without procuring a ticket or paying his fare from the way station. If, however, the company is not prosecuting the journey in a reasonable time and in a reasonable manner, as the passenger has the right to demand that it shall do, then he may leave the train which he selected, and continue his journey upon another under the original contract, and without paying an additional fare.

4. **CASE ADJUDGED.**—Appellant, having purchased a ticket, was a passenger upon a train which, about dark, was stopped upon the road by a wreck ahead of it. Being informed by the train officials that the train would be delayed several hours, perhaps all night, and that they could not tell when the train would be ready to proceed, appellant, who was sick, informed the conductor of the fact, and asked for a stop-over ticket, which was denied him. Appellant then left the train, and spent the night at the hotel and took another train next day. The conductor upon this train refused to accept the conductor's check, which appellant had received in lieu of his ticket the day before, and also refused to accept ticket fare which appellant offered to pay, and demanded as conductor's fare more than he was entitled under the rules of the company to demand. Appellant refusing to comply with this demand, the conductor ejected him from the train. *Held*—That under the circumstances appellant had the right, under his original contract, to stop over and take another train without paying additional fare. Moreover, the conductor's demand, being for more than he was entitled, in any event, to demand, was illegal, and appellant's refusal to comply gave the company no right to put him off the train.
5. **PEREMPTORY INSTRUCTION.**—While it is usual for the defendant, in moving for a peremptory instruction, to do so upon the plaintiff's evidence alone, yet the court may, after all the evidence has been heard on both sides, direct the jury to find for the defendant if *all* of the evidence is in his favor.
6. **THE BURDEN OF PROOF** in this case was on the plaintiff, the petition and answer putting in issue whether the plaintiff voluntarily left the train, and what was the full and established rate of fare.

W. O. BRADLEY AND F. H. REPPERT FOR APPELLANT.

1. After all the evidence on both sides had been heard, it was too late to ask a peremptory instruction. (*Hurt v. Miller*, 3 A. K. Mar. 337; *Dallam v. Handly*, 2 A. K. Mar., 423; *Woods v. McCombs' Adm'r*, 5 Ky. Law Rep., 694.)
2. A railroad company is liable for detention caused by negligence. It was, therefore, error to strike out that part of the petition which

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charged that the wreck was caused by defendant's negligence. (Hutchinson on Carriers, section 608; Quamley v. Vanderbilt, 17 N. Y., 306; Williams v. Same, 28 N. Y., 217; Vanbuskirk v. Roberts, 31 N. Y., 661; Cobb v. Howard, 3 Blatch., 524; Hamlin v. The Railway, 1 H. & N., 408.)

3. Even if the plaintiff's ticket would *ordinarily* have entitled him only to a *continuous* ride, yet the defendant having failed to prosecute the journey with reasonable speed, plaintiff had the right to stop over and wait for another train. (Hutchinson on Carriers, sections 588 and 608.)
4. There being no condition attached to the ticket which plaintiff purchased, he had the absolute right to stop over.
5. The defendant had no right, in any event, to charge plaintiff more than conductor's rates. It could not enforce against the plaintiff a regulation which had been a dead letter as to others. (Am. Law Reg., July, 1884, page 417.)
6. The conductor demanded even more than conductor's rates, and having demanded more than he was entitled to, he had no right to put off the plaintiff for failing to comply.

WM. LINDSAY FOR APPELLEE.

1. The plaintiff, knowing what the consequences would be, deliberately violated regulations of the company, which it is well settled the company had the right to make. He is, therefore, not entitled to recover.
2. While it is unusual to instruct peremptorily after the evidence has been heard on both sides, yet as the plaintiff wholly failed to make out his case, he was not prejudiced by the peremptory instruction.

BURDETT & BROWN AND HILL & ALCORN ON SAME SIDE.

1. As there was nothing on the face of the ticket that entitled the holder to any stop-over privilege, the ticket conferred no such privilege. (Hatton v. R. R. Co., 13 Am. & Eng. Railroad Cases, page 58; R. R. Co. v. Bartram, 11 Ohio St., 457.)
2. The company has the right to charge a higher rate of fare where the passenger has not procured a ticket, and to expel from the train a passenger who refuses to pay such extra rate. (Skillman v. R. R. Co, 13 Am. & Eng. Railroad Cases, page 81; R. R. Co. v. South, 43 Ill., 176; Stephen v. Smith, 29 Vt., 160; R. R. Co. v. Rogers, 38 Ind., 116; Hilliard v. Gould, 34 N. H., 280; R. R. Co. v. Guinan, 11 Tenn., 98; Steele v. Chovin, 7 Iowa, 204.)
3. The peremptory instruction was proper. (Hilliard on Torts, 125; L. & P. Canal Co. v. Murphy's Adm'r, 9 Bush, 588.)

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JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

This action is for an alleged trespass, committed upon the appellant, Wilsey, by a conductor of the appellee in ejecting him from its train, upon which he was a passenger. It appears that on October 25, 1883, he purchased at full rate a ticket without any condition or limitation upon its face, or any coupon attached to it, over the appellee's road from Danville Junction to London; and upon the same day he took passage upon it, the train arriving at Mt. Vernon between six and seven o'clock in the evening, where it was detained by a wreck upon appellee's road between that place and London until four o'clock the next morning, when it proceeded upon its trip. When it stopped at Mt. Vernon, the appellant was told the cause of it by the train officers, and upon inquiry of them, he was informed that it was uncertain how long the train would be detained, but at least for several hours. He was sick, and so informed them. The conductor having already taken up his ticket, and given him a check in lieu of it, he applied to him for a stop-over ticket, in order that he might leave the train and lodge for the night at a hotel. The conductor informed him that he could not give it, and he was also informed, either by the same officer or the baggage-master, that he could not travel upon any other train upon the conductor's check. He, however, went to a hotel for the night, and, so far as the record shows, had no knowledge of the time when the train proceeded on its trip. The next morning he boarded another passenger train for London, and

when it had gone about two or three miles the conductor called for his ticket, and as he did so, he took from the appellant's hat the conductor's check that had been given him upon the other train, and tore it up, after being informed that the appellant had paid his fare from the Junction to London, but before the latter had time to offer any explanation.

When he did so, however, that officer required him to pay his fare from Mt. Vernon to London, and upon his refusal to do so prepared to eject him from the train. He then said that he would pay it, and inquired the rate of ticket fare and conductor's fare, and was told by that officer that the first was eighty-five cents and the latter one dollar and five cents, as the conductor testifies, and which sum was, in fact, the conductor's true rate of fare under the rules of the company; but the appellant, as well as a witness introduced by the company, says that he said it was one dollar and fifteen cents. The appellant thereupon handed him eighty-five cents, and after counting it, he demanded, as he says, twenty cents more, while the other witnesses testify, and the appellee's answer admits, that it was thirty cents. The appellant refused to pay the fare demanded, and the conductor then returned him the eighty-five cents and ejected him from the train.

The judgment appealed from is one of non-suit, it having been ordered by the court after both parties had offered their testimony. The action was in tort for damages. The averments of the petition and answer at least put in issue whether the appellant voluntarily left the train, and what,

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was the full and established rate of fare. The lower court, therefore, improperly held that the burden was upon the appellee; and it therefore offered its testimony first. The appellant then introduced his evidence, and the motion for a non-suit was then made. This was a somewhat novel practice. Usually the defendant moves for a peremptory instruction upon the plaintiff's evidence alone; or he may mingle record or undisputed written evidence with it, and then do so; and we in fact see no reason why, when all of the evidence has been heard, the court may not direct the jury to find for the defendant, if *all* of it be in his favor.

Only a question of law is then presented. After the introduction of contradictory evidence, however, the jury have a right to weigh it, and the cause can not be withdrawn from them by a demurrer to the evidence.

The testimony was conflicting in this case as to the amount of fare demanded of the appellant by the conductor. If he demanded more than the usual rate and that fixed by the company, then it was an illegal demand with which the appellant was not bound to comply, and the appellee had no right by reason of the refusal to eject him from the train. But in front of this is a legal question of more importance. A railroad company has an undoubted right to prescribe such regulations as are suitable to enable it to execute its important duties.

The exercise of this power is necessary in order that it may both provide for the safety and comfort of its passengers and protect itself from im-

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regulations looking to these because the security of the interest of the railroad so that a lower rate may be collected for air fare upon the purchase tickets before discrimination is allowed, convenience in the transaction to the proper accountability of agents. But it must be general or for the public, and be carried out in good faith by the railroad corporation, accompanied with a reasonable opportunity for those who desire to do so to purchase tickets before entering the cars. If they do not avail themselves of the privilege, then they are at fault and must pay conductor's fare. Such a rule affords proper checks upon the accounting officers of the railroad, and protects it in a reasonable manner against possible fraud and dishonesty. (*Hilliard v. Goold*, 34 N. H., 230; *Stephen v. Smith, &c.*, 29 Vt., 160; *State v. Chovin*, 7 Iowa, 204; *Railroad Co. v. South*, 43 Ill., 176.)

It is also well settled, that when a passenger who holds a ticket from one point to another, selects his train, and enters upon his journey, that he has no right in law to leave it at a way station, and afterward enter another train of the company, and proceed to his destination without procuring a ticket, or paying his fare from the way station. His ticket is the symbol of the contract between him and the company, the relative duties of the parties under it being for the most part implied. The contract, however, is an entirety and indivisible.

By it the company undertakes to carry the holder between the places indicated by the ticket as one entire service for the whole distance and not by broken journeys. He is bound by his ticket contract to proceed directly to his destination when he has once made his election as to the time and means of going, and has called upon the carrier for performance, and the parties have mutually entered upon the performance of the contract. If the company sees fit to give him a lay-over ticket, it is as a mere accommodation, and not by reason of any legal obligation. If, therefore, he leaves the train upon which he starts, he commits a breach of the contract and ends it; and when he starts upon another train he begins a new journey, and must check his baggage anew. The reasons for this regulation are obvious.

Any other rule would necessarily impose upon the carrier duties not embraced by a reasonable interpretation of the contract. The payment of the fare entitles the passenger to have his ordinary baggage carried and checked to his destination. If he, by law, can stop at intermediate points at his pleasure, he may demand his baggage at each place, or if it goes on he will not be at his journey's end to receive it. Thus additional attention will be required upon the part of the company, an increased risk of accident created, and delays occasioned not within the fair scope of the contract. (Railroad Co. v. Bartram, 11 Ohio St. Rep., 457; 2 Rorer on Railroads, page 971, *et seq.*)

But, upon the other hand, the company owes

duties to the passenger. By the contract, it undertakes to make the transit covered by the ticket within a reasonable time; and it is only when it is doing so in a reasonable manner that the passenger has no right to leave the train, and take passage upon another under the original contract. To hold that he cannot under any circumstances whatever make a re-election of trains would give to the carrier an unfair advantage in the performance of the contract, and would be an unjust discrimination against the public. Reason dictates that for *good cause* a passenger may leave a train, and have his baggage delivered and embark upon another. The peculiar circumstances of this case say so. Here is a sick passenger upon a train, which about dark is stopped upon the road by a wreck ahead of it, and upon its own road. It matters not whether the wreck resulted from the company's neglect or not. It exists, and impedes the further passage of the train, and prevents the company from complying with the contract as it has undertaken to do within a reasonable time and in a reasonable manner. The passenger is informed by the train officials that the delay will last several hours; perhaps all night; that they can not tell when it will go on, and they fix no time when he must be present and ready to proceed. Is he in such a case required to remain upon the train all night or for an unknown time? We think not. Suppose the particular train upon which he has embarked was by some accident disabled from proceeding at all; would he not be entitled to take a later one, and proceed to his destination without

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the payment of additional fare? The delay in question could not be considered an ordinary one, and that hence the passenger must submit to it. The appellee was not bound to wait all night in the train, or from seven o'clock in the evening until four o'clock the next morning for the train to proceed. The company itself having first failed in the performance of the contract within a reasonable time, reason, a fair interpretation of the contract, as well as public policy, require a different rule in such cases from the general one. It is perhaps impossible to lay down one which will apply to all cases, as each one must necessarily depend upon its own peculiar circumstances; but if from accident or misfortune or other cause, and without the passenger's fault, his transit be interrupted, and it be more than an ordinary delay, then he may resume his journey afterward upon a different train, and without the repayment of fare.

In the case of *Dietrich v. Penn. Railroad Co.*, 71 Penn. St. Rep., 432, the circumstances of the case did not authorize the court to so hold in behalf of the plaintiff; but the court, in delivering the opinion, said:

"In adopting the language of the learned Chief Justice of New Jersey, we should not omit to guard our meaning by saying there may be exceptions where, from misfortune or accident, without his fault, the transit of a passenger is interrupted, and where he may resume his journey afterwards."

For the additional reason that the ruling of the lower court did not conform to this view of the law, the judgment below is reversed, and cause remanded for further proceedings in conformity to this opinion.

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CASE 72—PETITION ORDINARY—JANUARY 12.

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APPEAL FROM KENTON CHANCERY COURT.

1. WHERE INJURY TO THE BUSINESS OF A FIRM RESULTS from the dishonest practices of one of the partners, the other members of the firm may have an action against him for damages.

In this action upon a note executed for the purchase price of an interest in a partnership, the defendant is allowed to plead as a counter-claim damages resulting to the business of the firm from the dishonest conduct of the payee of the note, plaintiff's assignor, who continued to be a partner.

2. PLEADING—OBJECTION TOO LATE.—After an issue has been formed upon the general averments of a petition or counter-claim, and a verdict or judgment rendered, it is too late to object that the pleading should have been more specific.

WM. LINDSAY FOR APPELLANT.

1. One partner can not have an action against another for damages, because the defendant has so conducted himself in the management of the partnership business as to bring the good name of the firm into disrepute, and thereby to destroy its good will. Such damages are too remote to be made the basis of an action at law.
2. The defendant's pleading is fatally defective in that it does not allege the value of the good will of the partnership, or that it was of any value. It is further defective in that it states mere conclusions and not facts.

T. F. HALLAM ON SAME SIDE.

1. The defendant's claim for damages is not good as a counter-claim, the injury to the thing sold being subsequent to the sale, and not a part of the same transaction.
2. Neither law nor equity ever heard of a suit for damages by partner against co-partner on account of conduct whereby the partnership business has been lessened. The conduct of defendant's assignor may be without palliation, but there is no law for his case different from that for other persons.

O'HARA AND BRYAN FOR APPELLEE.

The "good will" of the firm having been destroyed by the conduct of plaintiff's assignor, the consideration for the purchase of the good will has entirely failed, and, therefore, defendant can not be required to pay any part of that consideration.

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

In the year 1873 the appellant, Boughner, Holmes & Chalfant, were engaged in the business of selling tobacco at one of the warehouses in Cincinnati, and on the first day of April of that year the appellee, Black, purchased of Boughner & Holmes an interest of one-sixth in the property and assets of the firm for the sum of five thousand five hundred and thirty-one dollars and seventy-three cents, and at the same time purchased an interest in the *good will* of the firm, for which he agreed to pay two thousand five hundred dollars, and all his profits on his share for one year exceeding two thousand five hundred dollars.

Boughner assigned his interest in these notes to his brother William, who instituted a suit at law against Black, seeking to recover the amount to which his brother was entitled, and making his co-partners defendants as well as the obligor Black.

The appellee Black made several defenses to the notes. He alleges that the larger note was procured by the fraudulent misrepresentations of the appellant as to the value and extent of the assets; further, that by the fraudulent acts of the appellant in conducting the business of the firm, that were unknown to all the partners, both before and after the date of his purchase, the patrons of the firm refused to sell tobacco at their warehouse, and the buyers to make purchases at their auction sales; in fact, it is alleged that the business of the firm was entirely destroyed. The appellee claims damages to an amount exceeding the sum claimed by

the appellant, and on the final hearing the appellant obtained a judgment for three hundred and fifteen dollars.

It is maintained by the appellant that the statements found in the answer and counter-claim of the appellee are but legal conclusions, and no substantial fact alleged requiring a reply or constituting a defense.

There was no demurrer to the answer, and the case was transferred to a court of equity without objection.

After admitting the execution of the notes and the consideration upon which they were based, and the large business done and profits realized by the firm, it is alleged "that at and before the date of the purchase of said good will the said Boughner and a certain L. F. Anderson, who was then and had been for some time in the service of the firm, were, unknown to the defendant, carrying on certain fraudulent transactions in the name of fictitious parties, in which they cheated and defrauded the customers and partners of said firm by fraudulently and surreptitiously changing the marks and brands upon the packages containing tobacco intrusted to said firm for sale, and making false and fraudulent entries of sales of said tobacco, and making false and fraudulent reports and accounts of sales of said tobacco to the owners thereof, and that said false and fraudulent practices were continued after the sale to the appellee without his knowledge or consent. That his frauds were discovered, and the reputation of the firm and the good will was entirely

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destroyed and rendered wholly valueless to the defendant, and said firm rendered unable to do any business at their warehouse for a long time, etc.

That this answer should have been more specific in its averments is unquestioned; but the appellant, instead of requiring the appellee to cure the defect either by motion or otherwise, filed a reply to the answer, in which each and every allegation of fraud is denied, and the case referred to the commissioner for proof upon the issues made.

It is too late, after an issue is formed upon such general averments, and a verdict or judgment rendered, to raise the question for the first time that the charges should have been more specific. The attention of the appellant was called to the nature of the defense, that if defective was only the subject of special demurrer, that could have been made the foundation for a rule against the pleader to make his statements more certain that an answer might be filed.

The fraud practiced by Boughner and the principal clerk in the warehouse is clearly shown. They were engaged not only in selling the tobacco for their customers, which was the legitimate business of the firm, but they were also engaged in purchasing the tobacco sent them for sale under the fictitious name of E. G. Prime. When there was tobacco on the brakes that sold for more than the tobacco they had purchased, they would substitute one of their own hogsheads of an inferior quality for the good tobacco, changing the numbers and the hogsheads, and were practicing a system of frauds upon their

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customers that, when discovered, destroyed the business of the firm, and must have caused great pecuniary loss. This house was known as the Planters' Warehouse, and the other warehouses, in order to preserve the integrity of the trade in that city, caused the doors of the house to be closed, and the buyers refused longer to have business transactions with the firm, while all the partners but Boughner seem to have retained the confidence of the trade, and were men of a high order of integrity; but his conduct wrecked the firm in a financial and business point of view.

The fraud of the partner, who is asserting his right to recover the amount of these notes to the extent of his interest, being clearly established, it is urged by counsel that the damages to the good will of the firm are too remote to be made the basis of an action. It is conceded that a dissolution of the firm may be had, and the partner in default made liable for money or property actually lost by his dishonesty, and for any moneys the firm may have been compelled to pay on account of the fraud, but that no action for damages against the partner, resulting in an injury to the business of the firm by reason of his dishonest conduct can be maintained.

The attention of the court has not been called to any authority bearing on this question by counsel on either side, still it seems to us that the mere fact of the appellee being a partner with the appellant in the business in which this fraud was practiced will not prevent such a defense as is relied on to defeat the recovery in this case. Both notes were

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executed for an interest in the partnership, and that interest has been made worthless by the fraudulent conduct of the partner making the sale, and who is now seeking through his assignee to recover the purchase money. That a partner can be made liable to his co-partner for an error of judgment in the conduct of the partnership business, or because his management or control of the business has resulted in loss, is not contended for by counsel of the appellee, nor is it a question involved in this case.

The fraud of the partner in selling out an interest in the partnership that was seemingly prosperous at and before the sale, and would have so continued but for the hidden frauds that were being then and after the sale practiced by him on his patrons, is offered as a defense to the recovery of the purchase money notes by the vendee, who knew nothing of the fraud, that, when developed, resulted in the financial ruin of the firm and the total destruction of its business. Scarcely an effort has been made to disprove the fraudulent conduct of Boughner, and if no precedent can be found where such a defense has been successfully interposed, it is not too late to establish one, making the party practicing the fraud responsible in damages for the wrong, although it may originate from or be connected with a partnership transaction.

The consideration money from the one to the other in this case has failed, and if not wholly lost, the incoming partner, who has been seduced in making his purchase without any knowledge or means of knowing the fraud that was being practiced, that

must necessarily result in the ruin of the firm, should not be compelled to pay to the extent of the consideration received, if the damages sustained exceed the amount he agreed to pay.

Mr. Lindley, in his work on Partnership, says:

"If a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does any thing which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium." (vol. 1, page 73.)

The doctrine of the text applies to a case where there is no fraud or misconduct on the part of the partner selling an interest, and certainly where such fraud has been practiced as is developed here, the party injured must have a remedy.

"If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses, viz. either abide by the contract, and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts, or he may disaffirm the contract, and entitle himself to the whole of the money he has paid." (Lindley on Partnership, vol. 1, page 72.)

In this case the partnership is asked to be settled, and a report of settlement made by the commissioner.

The appellant was entitled to only one-half of the proceeds of the two notes by the terms of his sale. The appellee paid off the purchase money note, executed for the *good will* of the firm, and his damages,

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by reason of the fraudulent conduct of the co-partner, greatly exceed the amount which appellee might be owing upon a settlement of the partnership accounts.

In the year ending in January, 1874, the house had sold seven or eight thousand hogsheads of tobacco, and was prosperous in its business, having through its agents worked up an excellent trade in the States of Ohio and Kentucky. Their agents declined to send tobacco to their warehouse when the fraud was developed, and the buyers began to make reclamations in money by reason of the fraudulent conduct of Boughner. Their trade extended to all the tobacco districts in both Kentucky and Ohio contiguous to Cincinnati, all of which was lost by the firm ceasing to do business, and the expulsion of Boughner from the tobacco association. The fact that the other partners resumed business in a short time did not lessen the damages sustained. They had to build up a new trade, and give to the house a reputation for commercial integrity of which it had been deprived by the gross frauds of Boughner, before it could compete with similar warehouses in the city.

Without discussing or determining the question raised as to the representations alleged to have been made by Boughner as to the value of the assets at the time of the sale to the appellee, we are satisfied the damages resulting to him directly from the conduct and acts of Boughner will more than exceed the interest of the latter in the notes in controversy.

The judgment below is therefore affirmed.

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CASE 73—PETITION EQUITY—JANUARY 23.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

1. AN OFFICER'S RETURN UPON A SUMMONS is not conclusive before judgment has been rendered, but the defendant may contradict it and show such a defect in the service as will prevent the court from taking jurisdiction.

In this transitory action the defendant had the right to show that the summons was served in another county than that stated by the officer in his return.

2. THE RETURN OF A SPECIAL BAILIFF upon a summons which shows *how* and *when* it was executed is sufficient.
6. APPEARANCE TO ACTION.—While a party enters his appearance if he does any act from which it may be presumed that he acknowledges the jurisdiction of the court, motions based upon an alleged want of jurisdiction can not have that effect.
4. STATUTES—RETROACTIVE EFFECT.—The act of March 6, 1878, declaring Diamond Island, in the Ohio river, to be a part of Jefferson county, can only be regarded as declaratory of the county location of the island from the enactment of the statute, and can not, therefore, affect a service of summons made prior to the passage of the act.

In this case a service of summons at a particular place on Diamond Island prior to the act of March 6, 1878, is held to have been made in Oldham county.

JOHN B. BASKIN FOR APPELLANT.

1. The return of an officer upon process is conclusive, and can not be traversed in the case in which it is made. (Taylor v. Lewis, 2 J. J. Marsh., 400; Shaffet v. Meniffee, 4 Dana, 150; Smith v. Hornback, 8 Marsh., 392; Armstrong v. Easton, 1 B. Mon., 66; Gwynne on Sheriffs, page 473.)
2. The officer's return of a process need not show that the court has jurisdiction. It is sufficient if it show time and manner of service.
3. By making motion to quash the officer's return, and by filing affidavits in support of the motion, a defendant enters his appearance to the action.

The same result follows from a motion to quash a warning order or from filing an affidavit controverting an attachment. (Duncan v. Wickliffe, 4 Met., 120; Civil Code, section 690.)

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N. T. CRUTCHFIELD ON SAME SIDE.

A legislative enactment declaratory of the present and past course of a county boundary is valid, although retroactive in its operation. (*Satterlee v. Mathewson*, 2 Peters, 412-18; *Mahony v. McGee*, 4 Bush, 529; *Ford v. Hall*, 1 Mon., 24; *Grundy v. Commonwealth*, 12 Bush, 350; *Head, &c., v. Ward, &c.*, 1 J. J. Marsh., 284; *Goslem v. Stonington*, 4 Conn., 209; *Mathew v. Chapman*, 6 Conn., 58; 7 Conn., 319; *Ibid*, 351; 6 Conn., 198.)

C. B. SEYMOUR FOR APPELLEE.

1. A defendant does not waive any objection to the jurisdiction, or enter his appearance to the action by making any motion founded upon a want of jurisdiction.
2. An appearance for the special purpose of objecting to the jurisdiction does not cure defects in the process. (Civil Code, sections 79, 80.)
3. The return must show place of service.
4. An attachment issued in an action in which process has been improperly executed, or in which a warning order has been procured by a false affidavit, should be discharged. A judgment sustaining such an attachment would be in violation of article 12 of the Federal Constitution.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

This is a transitory action for debt, brought in the Louisville Chancery Court, on April 19, 1877, and dismissed by it for want of jurisdiction in December, 1883. It was originally brought against the appellee alone. Subsequently, another party, who was served with a summons in Jefferson county, was made a defendant, but the appellant dismissed the action as to him, and the question presented is, whether the court properly held that the appellee was not before the court. At the institution of the action a summons was sued out to both Jefferson and Oldham county, but they were never returned. The attachment, which was then also issued, was levied upon a tract of land belonging to the appellee in Jefferson county, but was not served upon

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him. Subsequently, another ~~summons~~ was issued to the last named county, but it was ~~never~~ returned. On December 8, 1877, another was sued out, and a special bailiff, properly deputed by the marshal of the court, made, and verified by his oath, this return upon it: .

“Executed January 5, 1878, upon Joseph Newkirk, by delivering to him a copy of the within summons.
J. W. BENNETT, S. B.”

Subsequently, the appellee appeared and moved to quash the service and return of the officer upon the ground that it was served upon him in Oldham county, and filed several affidavits in support of the motion; but it was not then decided.

In January, 1879, another summons against the appellee was returned by the sheriff of Jefferson county, with the information that he had found him in the county, but could not get near enough to him to read the summons to him or give him a copy.

After this a warning order was entered against the appellee as a non-resident. He appeared, reserving his objection, however, to the jurisdiction, moved to set the order aside for want of jurisdiction, and filed affidavits showing that the grounds upon which it had been made were not true. His motion was sustained. On November 23, 1883, he again objected to the jurisdiction of the court, and for the alleged want of it moved to dismiss the action and discharge the attachment.

In each instance where he appeared in court he objected to the jurisdiction, and the motions by him to ~~quash~~ the return upon the summons and to set.

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aside the warning order did not confer it. They were all based upon an alleged want of jurisdiction. A party enters his appearance if he does any act from which it may be presumed that he acknowledges the jurisdiction of the court. These motions, however, denied it. The return by the special bailiff was sufficient. It appears from it *how* and *when* it was executed, and this is all that section 49 of the Civil Code requires. It is urged, however, that it was conclusive, and that nothing *dehors* the officer's statement can be received to show that it is not true.

As the marshal of the court had the power to execute process co-extensive with the State, it may be said that the affidavits showing that it was in fact executed upon the appellee in Oldham county, were not, in fact, contradictory of it. But, aside from this, there is no doubt but that the appellee had the right to question the return as a mistake, and show that he was not, in fact, served in Jefferson county. Suppose that a summons be returned as executed upon A, the defendant to a suit, when in fact it was served upon B; can not the former show this fact? It is true there are cases holding that an officer's return can not be questioned collaterally; that it can not after judgment, and in the absence of fraud by the party benefited by it, be impeached by a chancery proceeding, to which the officer was not a party. In these cases, however, rights had accrued or vested. The stability of a judgment or the muniments of title depended upon the verity of the record. To question collaterally the action of the officer under such circumstances

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would impair public confidence in judicial records. There was no judgment, however, in this case; and to deprive a defendant of the right to question the return before any right had accrued, would create a rule devoid of reason, and creative of litigation.

When the special bailiff served the summons upon the appellee, the latter was residing upon Diamond Island, in the Ohio river, and it was executed upon him there. It is within the Kentucky line, but it appears to have been at times a disputed question whether it belonged to Jefferson or Oldham county, or in part to each. This arose from the fact, that although the Kentucky line is low-water mark upon the Indiana side of the river, yet the act establishing Oldham county defined its boundary as beginning "at the mouth of Pond creek (which is upon the Kentucky side) opposite Diamond Island;" and after running a series of courses and distances to the Gallatin county line; "thence along the Gallatin county line to the State line on the Ohio river; thence down same to the point of beginning." The beginning point, however, being fixed, the line to close the survey must be run at a right-angle, or in other words, and reversing it, from the mouth of Pond creek across the river at a right-angle to low-water mark upon the opposite shore.

The affidavits filed by the appellee stated unequivocally that the house where the service was made was in Oldham county; and that if a line at a right-angle with the river were drawn across it from the point where the dividing line of the two counties struck the river, the house would be left

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in Oldham county; and that even if the line between the two counties were continued in the same course across the river, it would leave the house still farther in Oldham county. It appears that the land where the house was situated, and which belonged to the appellant Barbour, was assessed by him in 1877 in Oldham county; that he had sworn in a legal proceeding that it was in that county, and that the parties to this action so regarded it. The act of the Legislature of March 6, 1878, declaring the island to be a portion of Jefferson county, and that it had been such since the creation of the last-named county, was passed subsequent to the service of the summons, and can only be regarded as declaratory of the county location of the island from the enactment of the statute.

Whether the summons was served in the one county or the other, was a question of fact upon which the lower court has passed; and although the appellant may lose an honest debt, yet we do not feel authorized to disturb its conclusion.

Judgment affirmed.

CASE 74—FORFEITED RECOGNIZANCE—JANUARY 26.

Ramey, &c., v. Commonwealth.

APPEAL FROM PIKE CRIMINAL COURT.

1. BAIL ARE NOT DISCHARGED until they have placed the defendant in the custody of the court, where they found him, or have surrendered him to the jailer. A mere continuance from one term to another does not release the bail.

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In this case the appellants undertook by a recognizance that the defendant should appear at the next term of the circuit court "to answer the indictment," and not depart "without leave of court." The case was continued at the next term, and when called for trial at the first term of the criminal court thereafter, to which all indictments had been transferred by the act creating that court, the defendant failing to appear, his recognizance was forfeited. *Held*—That the bail are not released.

2. CREATION OF CRIMINAL COURT—EFFECT ON BAIL.—Where by virtue of an act of the Legislature creating a criminal court all indictments pending in the circuit court for a particular county are transferred to the criminal court, all who have undertaken that a defendant shall appear in the circuit court are bound to take notice of the act creating the criminal court, and of the time prescribed therein for holding the first term of that court in the county where the indictment is pending, and are as fully bound for the defendant's appearance there as they would have been for his appearance in the circuit court at its next term if the criminal court had not been established.

JAMES M. YORK FOR APPELLANTS.

The undertaking of appellants was for the appearance of the defendant at the March term, 1884, of the Pike Circuit Court, and when the defendant appeared at that term, appellants were no longer bound, as they did not undertake that the defendant would at all times render himself amenable to the orders and process of the court. (Criminal Code, sections 78 and 85; Commonwealth v. Daniels, &c., 9 Bush, 551.) This case is unlike the case of Commonwealth v. Branch, 1 Bush, 60.

P. W. HARDIN, ATTORNEY-GENERAL, FOR APPELLEE.

Appellants undertook that the defendant would appear to answer the charge, *and not depart without leave of court*. The case was not called for trial, but continued, and this operated as a continuance of the liability. (Commonwealth v. Branch, 1 Bush, 60; Miller v. Commonwealth, 1 Duv., 19.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

John Maynard being under indictment in the Pike Circuit Court, appellants, at the September term, 1883, thereof, entered into the following recognizance:

"The defendant having been surrendered to the

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jailer * * was brought into court, and Joseph Ramey and Samuel Daniels * * appeared personally in court, and acknowledged themselves jointly indebted to the Commonwealth in the sum of five hundred dollars, to be void, however, if John Maynard shall appear in the Pike Circuit Court on the first day of its next March term, to answer the indictment for maiming found in said court against him, and not departing without leave of said court."

At the March term the case was continued to the September term, 1884, of that court, but upon whose motion does not appear, and at the same time witnesses for the Commonwealth were recognized, and an order of forfeiture and attachment against one of them was entered.

But by an act approved March 17, 1884, the "Criminal Court for the sixteenth judicial district," which includes Pike county, was created, the first term of the Pike Criminal Court held under that act beginning the first Monday in May, and taking jurisdiction of all criminal and penal cases pending in the Pike Circuit Court, including the case mentioned against Maynard, and he not appearing when the case was called at that term of the criminal court, the recognizance of appellants was adjudged forfeited, and at the July term thereof judgment for the amount fixed in the recognizance was rendered against them, both their motion to quash the summons and demurrer being overruled.

The question on this appeal is, whether the Commonwealth was entitled to a forfeiture of the recognizance and judgment against the bail by reason of

the failure of the defendant Maynard to appear at the May term, 1884, of the Pike Criminal Court to answer the indictment.

As the bail as well as the defendant were required to take notice of the act creating the Pike Criminal Court, and of the time prescribed thereby for holding the first term of that court, it seems to us clear that appellants were as fully bound for his appearance there as they would have been bound for his appearance at the September term of the circuit court, if the act creating the criminal court had not been passed.

The stipulation of the recognizance is for the appearance of John Maynard on the first day of the March term, 1884, of the Pike Circuit Court, to answer the indictment; and if construed literally without reference to the purpose for which he was to appear, or the provisions of the Criminal Code, it might be held that the bail were bound for his appearance on that day only, and that his mere personal presence would operate to discharge them. But the condition prescribed by law on which a defendant legally in custody of the court charged with a public offense may be discharged on bail or recognizance is, that the bail undertake that he shall appear before the court for the trial thereof. And as said by this court in *Miller v. Commonwealth*, 1 Duvall, 14: "The controlling principle seems to be that until the defendant is surrendered, or his appearance entered in discharge of the bond, the sureties have the control of him, and the court has not." For there are only three conditions upon which the

court in which a prosecution for a public offense is pending can legally direct the defendant to be arrested and committed to jail after he has given bail, or deposited money in lieu thereof:

1. When, by having failed to appear, a forfeiture has occurred.

2. When the court is satisfied that his bail, or either of them, is dead or insufficient, or has left the State.

3. Upon an indictment being found for an offense not bailable.

On the other hand, the bail may, at any time before a forfeiture, surrender the defendant to the jailer in vacation, or to the court when in session, and be thereupon exonerated.

It seems to us that if the recognizance in this case amounts to an undertaking that bound appellants at all, they continued bound until exonerated or discharged by delivering the defendant into the custody of the jailer or court; for until released by reason of the recognizance, the court had the power to hold him in custody, not merely from day to day, but from term to term of the court, until his case could be regularly reached and tried.

The meaning of an undertaking by bail who take from the court the custody of a defendant charged with a public offense is, that they will surrender him either before or when he is called to answer the charge; and, as has been heretofore held by this court, a mere order of continuance from one term of the court to another does not of itself release the bail or impair their undertaking, the only manner

in which they may be discharged being prescribed by law. In short, they have no right to claim a discharge of their undertaking until they have placed the defendant in the custody of the court where they found him, or surrendered him to the jailer.

By section 85, Criminal Code, it is provided that no bail bond or bail recognizance shall be deemed to be invalid by reason of any variance between its stipulations and the Code, provided it be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the bond or recognizance, and provided it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before * * a court for the trial thereof.

That the defendant in this case was in custody under an indictment for a public offense when the recognizance was entered into by appellants, and that he was discharged by reason of the recognizance, are beyond question, and it seems to us also clear that appellants undertook that the defendant Maynard should appear before the Pike Circuit Court for the trial of the charge; for the language used in the recognizance imports nothing less than that.

The record shows that when the case was regularly called in the Pike Criminal Court, the defendant did not appear for the trial of the charge, or, in the equivalent language of the recognizance, *to answer the indictment found against him*, and, consequently, appellants failed to comply with their undertaking, and the judgment of the lower court was proper, and is affirmed.

Tucker, &c., v. Grundy, &c.

CASE 75—PETITION EQUITY—JANUARY 28.

Tucker, &c., v. Grundy, &c.

APPEAL FROM WASHINGTON CIRCUIT COURT.

1. A COURT OF EQUITY NEVER WANTS A TRUSTEE, and when property has been bequeathed in trust, and the trustee appointed refuses to take, the court will decree the execution of the trust by the personal representative, who is deemed the trustee, if the trust estate is personal property.

A testator directed that the portion of his estate going to his daughter should be placed in the hands of his brother as trustee for her, he to pay over to her annually the interest thereon. The trustee, who was also one of the executors, accepted the trust, and executed bond, but subsequently filed in the county court his resignation as trustee; but no order was made discharging him of the trust. The *cestui que trust* subsequently instituted this action, alleging these facts, and that by a settlement made by the executors a balance was shown to be in their hands, to one-third of which she was entitled under the will, but that she had not received any part of it or the interest thereon, by reason of the refusal of her uncle to act as trustee, and her inability to induce any one to act in his stead. She prays judgment discharging the trust, and for the payment by the executors of her share directly to herself.

Held—That while the facts alleged do not authorize a judgment discharging the trust, they do require the interposition of the Chancellor, and it was error to sustain a demurrer to the petition. Whether or not the trustee was discharged by the mere tender of his resignation in the county court as one of the executors, he is to be regarded as a trustee as to the money in their hands, and he and the other executors should be held accountable to the *cestui que trust* for the interest thereon from the date of settlement.

2. A TRUSTEE UNDER A WILL IS NOT DISCHARGED from the duties of the trust by the mere tender of his resignation in the county court, having once accepted the trust.

W. E. SELECMAN FOR APPELLANTS.

As the trustee appointed refuses to act, and the court fails to accept his resignation, the trust has failed, and should be discharged. (Perry on Trusts, section 920.)

W. E. & S. A. RUSSELL FOR APPELLEES.

Brief not in record.

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Tucker, &c., v. Grundy, &c.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

By the will of Charles Grundy all his cash and cash notes were directed, after the death of his wife, Miranda Grundy—which, however, occurred before he died—to be equally divided between his three children, Thomas S. Grundy, Palmer Grundy, and Susan Tucker; but in relation to the last-named he made the following provision:

“It is my wish that the one-third portion of my money coming to my daughter, Susan Tucker, shall be placed in the hands of my brother, Samuel R. Grundy, as trustee for her, and he to manage and control the same, and to pay over to her annually the interest on the same. It is my wish that should he at any time think it necessary to use any portion of the principal for the use and benefit of my daughter, Susan Tucker, he should have the power to do so. I also will to my daughter and her children all my undeeded land. * * * It is also my wish that my brother, Samuel R. Grundy, as trustee for my daughter, Susan Tucker, to have control of all my timber and fire-wood on the above named land, and it is my wish that no one be allowed to settle on said land without the approbation of brother as trustee,” etc., etc.

This action was instituted August, 1884, by Susan Tucker and her husband, Jos. H. Tucker, against Thomas S. Palmer and Samuel R. Grundy.

In the petition the plaintiffs, after reciting the provisions of the will we have quoted, it being filed as an exhibit, state that the three defendants were duly qualified and acted as executors, and that

Tucker, &c., v. Grundy, &c.

Samuel R. Grundy, one of them, also on October 25, 1881, accepted the trust mentioned, and executed in the county court a bond as trustee, but afterwards, June 22, 1882, filed in the same court his resignation as such, though no order of that court has been made discharging him of the trust.

They state that by a settlement made December, 1883, a balance of twenty thousand two hundred and seven dollars and twenty-nine cents was shown to be in the hands of the executors, to one-third of which the plaintiff, Lucy Tucker, was entitled under the will, but she had not received any part of it, or the interest thereon, by reason of the refusal of Samuel R. Grundy to act as trustee, and her inability to induce any one else to do so in his stead.

They therefore pray the court to render judgment discharging the trust, and for the payment by the executors of the share she is entitled to directly to herself.

To this petition a general demurrer filed by the defendants was sustained, and the plaintiffs declining to amend, the action was dismissed.

It seems to us the Chancellor erred in dismissing the action.

It is true the prayer of the petition is for the discharge of the trust and the payment of the principal sum directly to the *cestui que trust*. Nevertheless, a state of facts is set forth in the petition which requires the interposition of the Chancellor, and in which he undoubtedly possesses plenary power to grant relief.

Taking the statements of the petition as true,

there has been in the hands of the executors since December, 1883, about six thousand seven hundred and thirty-five dollars and seventy-six cents, the interest on which, at least, Lucy Tucker, beyond question, is entitled to under her father's will; but by reason of the failure or refusal of the trustee appointed by the testator to act, she has been deprived of it, and it seems probable she will continue to be deprived of it, unless the court ascertains and determines the relative rights and duties of the parties to this action.

We do not think the facts stated in the petition are such as to authorize a judgment discharging the trust, whereby the manifest intention of the testator will be defeated; for it is a well settled rule that admits of no exception that a court of equity never wants a trustee, and when property has been bequeathed in trust, and the trustee appointed refuses to take, the court will decree the execution of the trust by the personal representative, who is deemed the trustee, if it is personal property. (Perry on Trusts, section 38; Story's Eq. Jur., section 976.)

In this case Samuel R. Grundy, having once accepted the office of trustee, it seems to us was not, by the mere tender of his resignation in the county court, discharged from its duties; but whether he was or not, as one of the executors of the will, he is to be regarded as a trustee as to the money in the hands of the executors; and he and the other executors should be held accountable to Lucy Tucker for the interest thereon from the date of the settlement.

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Instead of dismissing the petition, the court should have required the executors to answer the allegations it contained, and rendered such judgment as was necessary to carry out the intentions of the testator, and the trust created for the use of the devisee, Lucy Tucker; for it was the duty of the defendants, as executors, to have asked, instead of preventing by their demurrer, the interposition of the Chancellor in effectuating the will of the testator.

The judgment must be therefore reversed, and cause remanded, with directions to hold the executors responsible as trustees of the fund in their hands for the use of Lucy Tucker until a trustee is appointed in the place of Samuel R. Grundy, which the court, in its discretion, may or may not do.

CASE 76—PETITION EQUITY—JANUARY 14.

Stowers v. Hollis by &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **INFANTS—CONTRACT TO SUPPORT BASTARD CHILD.**—The contract of an infant in discharge of an obligation imposed upon him by law, either general or statutory, is valid.
An infant accused by the mother of a bastard child of being the father of the child may admit his liability, and bind himself by a contract to support the child.
2. **STATUTE OF FRAUDS.**—Such a contract is not within the statute of frauds, as it might have been fulfilled within a year from the making of it by the death of the child.
3. **EVIDENCE.**—The mother of a bastard is a competent witness to prove a contract made by the father with her for the support of the child, although he be dead when she testifies, she not being a party to the issue or interested in the result.

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Stowers v. Hollis by &c.

THOMAS JOYES FOR APPELLANT.

1. The common law does not impose upon a man an obligation to support his bastard child. That obligation depends entirely upon the statute, and to fix the liability arising from this obligation, the statutory requirements must be strictly complied with. The promise of the father must be expressly alleged and proved; also the time at which it is to be fulfilled. The father's liability is not fixed until established by the verdict of a jury. (*Bull v. McCrea*, 8 B. Mon., 424; Civ. Code, section 131; *Gossam v. Badgett*, 6 Bush, 100, 101; *Furilio v. Crowther*, 1 Dow. & Ry., 612; *Simmons v. Bull*, 21 Ala., 503, 504; *Moncrief v. Eby*, 19 Wend., 405; *Marlett v. Wilson*, 30 Ind., 241; *Nine v. Starr*, 8 Oregon, 49; 1 *Parsons on Contracts*, 312; *Clarke v. McFarland*, 5 Dana, 47, 48; *Burgen v. Straughan*, 7 J. J. Marsh., 583; 4 *Cruise's Digest*, page 119; Gen. Stat., chapter 7, sections 2, 3, 6 and 8; *Chandler v. Commonwealth*, 4 Met., 70; *Britton v. Williams*, 6 Munf., 453; *Bennett v. Davis*, 6 Cowan, 393; *Soper v. Fry*, 37 Mich., 239; *Johnston v. Louisville*, 11 Bush, 533.)
2. The mother of a bastard child is incompetent to testify against the father in a suit upon a contract made by him with her for the support of the child, he being dead. (Civil Code, section 606, subsection 2; *Alexander's Ex'r v. Alford & Co.*, 4 Ky. Law Rep., 693; *Hardin's Adm'r v. Taylor*, 78 Ky., 596; *Marvin's Adm'r v. Lambert*, 10 Bush, 297; *Chenowith v. Fielding*, 2 Met., 518; *Hobbs v. Russell*, 79 Ky., 61.)
3. The support of a bastard child is not a necessary for an infant, and his contract therefor is not binding. (*Dilk v. Keighly*, 2 Esp., 480; *Whyall v. Champion*, 2 Strange, 1083; *Whittingham v. Hill*, Cro. J., 494, volume 2.)
4. An infant is not liable on his express contract for necessities. His implied contract for necessities is the only one which the law considers binding. (1 *Amer. Lead. C.*, 104; *Beeler v. Young*, 1 Bibb, 320; *Abell v. Warner*, 4 Ver., 151; *Pool v. Pratt*, 1 Chipman, 252; *Oliver v. Woodruff*, 4 M. and W., 650, cited in *Smith on Contracts*, page 315; *Hanks v. Deal*, 3 McCord, 257.)
5. An infant's executory contract is not enforceable. (*Swift v. Bennett*, 10 Cushing, 488; *Earle v. Peale*, 1 Salk., 387; 10 Mod., 67; *Darby v. Boucher*, 1 Salk., 279; *Beeler v. Young*, 1 Bibb, 320; *Pool v. Pratt*, 1 Chipman, 252; *Hunt v. Peake*, 5 Cowen, 475.)
6. The contract was void. It imposed no obligation on the mother, as it could not have prevented her instituting proceedings at any time to enforce the statutory liability. (*Com. v. Davis*, 6 Bush, 295; *Com. v. Turner*, 4 Dana, 513.)
7. The contract for the support of the child should have been in writing, as it was not to be performed within one year. (*Davenport v.* vol. 83.—35)

Stowers v. Hollis by &c.

Gentry, 9 B. Mon., 427; Goodrich v. Johnson, 66 Ind., 250; Dobson v. Callis, 1 Hurl & Norm., 81; Smith v. Westall, 20 Raymond, 316-317; Brich v. Earl of Liverpool, 9 B. & C., 392; Sweet v. Lea, 3 Man. & Gr., 452; Hanna v. King, 9 B. Mon., 369; Bull v. McCrae 8 B. Mon., 428.)

L. N. DEMBITZ FOR APPELLEE.

1. An agreement by the father of a bastard child that he will support the child in consideration that the mother will not prosecute him, is valid.
2. The statute makes no distinction between adults and infants as to the liability for the support of illegitimate offspring. The contract of a minor to pay for the support of his illegitimate child is binding as being for necessities. (Swift v. Bennett, 10 Cushing, 463; Turner v. Frisby, 1 Strange, 168; Chapple v. Cooper, 13 Mee. & W., 252; Gen. Stat., title "Bastardy.")
3. A contract to support a child for a given time is not within the statute of frauds, as it may, by the death of the child, be performed in less than a year. (Peters v. Westborough, 19 Pick., 364; Elliott v. Turner, 4 Md., 476; Howard v. Burgen, 4 Dana, 187.)
4. The contract for supporting the child was in favor of the child, not of the mother, and the mother is a competent witness to prove the contract against the father. (Alexander's Adm'r v. Alford, 4 Ky Law Rep., 693.)
5. One who makes a contract for the benefit of another, is a competent witness for the beneficiary against the other party.

JOHN L. SCOTT ON SAME SIDE.

1. The claim of a bastard child upon its father for support is equitable.
2. An agreement by the father of a bastard child to support it, in consideration of an agreement by the mother not to prosecute the father, is valid. This is not affected by the fact that the father is an infant. This is the same under both statute and common law. (Burgen v. Straughan, 7 J. J. Marsh., 583; Commonwealth v. Turner, 4 Dana, 513; Chandler v. Commonwealth, 4 Met., 68.)
3. As the object of bastardy proceedings is the maintenance of the child, all proceedings, agreements or contracts taken or made by the mother, have the same effect as if taken or made by the child. (Schouler v. Commonwealth, Litt. Sel. Cas., 88; Hamilton v. Commonwealth, 3 Mon., 313; Scanlan v. Commonwealth, 6 J. J. Marsh., 585; Chandler v. Commonwealth, 4 Met., 67; Francis v. Commonwealth, 3 Bush, 6.)
4. The mother of a bastard child is a competent witness in a suit upon a contract by the father to support the child, although he be dead when she testifies. She is not interested in the result of the proceeding.

Stowers v. Hollis by &c.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

In this equitable action to settle the estate of David Stowers, deceased, the infant appellee, Mary B. Hollis, by her guardian, and as the illegitimate child of the decedent, asserts a claim to a support until she may be able to support herself, or until her death, in case it occurs before the end of that period. She bases her right to it upon an alleged contract for her benefit made soon after her birth, which occurred on April 12, 1879, between the deceased and her mother, by which the alleged father agreed, in consideration that no steps under the bastardy act were taken against him, that he would support the appellee.

In our opinion, the annual allowance until the child might die or become fourteen years old, decreed by the lower court, was reasonable, both as to time and amount, and sustained by the testimony.

It clearly appears that the decedent was the father of the appellee, and while the testimony as to the alleged contract is not of such a convincing character as to place it beyond doubt whether it was ever made, yet this is a question of fact upon which the lower court has passed, and we do not feel authorized upon the testimony to disturb the finding.

The only evidence to support it, however, is that of the mother of the appellee, and it is urged that it having been made by her with one who was dead when she testified, her evidence under our testimony law is incompetent.

This position is untenable. She is not a party to

Stowers v. Hollis by &c.

the issue, or interested in the result; did not testify for herself, and must be regarded as having acted merely upon behalf of the appellee in the transaction. The promise was for the benefit of the child, but made to the mother, because, under the bastardy act, she was the proper one to institute legal proceedings to compel the father to support the child.

The deceased was under age when the contract was made; and both his then infancy, as well as the claim that the contract was not to be performed within a year, and was, therefore, within the statute of frauds, are relied upon to defeat the appellee.

Section 1, chapter 22, of the General Statutes, provides that no action shall be brought to charge any one "upon any agreement which is not to be performed within one year from the making thereof," unless it be in writing. The contract, however, might have been fulfilled within a year from the making of it by the death of the child. This would have operated as a defeasance of it, and it was therefore capable of a full performance within a year.

If the performance of a contract depends upon a contingency which may happen within a year, then it is not within the statute, although that contingency may not in fact happen until after the expiration of the year; and although the parties may not have expected that it would occur within that period. It is sufficient if the *possibility* of performance existed.

Thus a parol promise to pay so much money upon the return of a certain ship; or to one upon the day

of his marriage; or to support one for a certain number of years, is not within the statute, although the ship may not return, or the party marry, or the person die within a year.

The event *might* have occurred within that time, and therefore the statute does not apply. (Ellicott v. Peterson's Ex'rs, 4 Md., 476; Peters v. Westborough, 19 Pick., 364; Howard's Adm'r v. Burgen, 4 Dana, 137.)

There is a natural obligation upon every man to care for his offspring until it is self-supporting. It is not sufficient in itself as a consideration to support a contract; and by the common law there was no legal liability upon the part of the father to support his bastard child. But in most, if not all civilized countries, he can now, at the instance of the mother, be made to do so, under the statute, by what is known as a "bastardy proceeding;" and if he contracts to do what he can by law be forced to do, and in consideration that no legal steps shall be taken against him to compel it, the contract is not only good in law, but based upon natural justice.

A contract between the putative father and the mother for the payment of a gross sum to the mother, is perhaps open to question as against public policy; but no such question can arise as to a contract like the one now under consideration.

That this is the law where the father is an adult there can be no question, and it would be equally without question as to an infant if by the general law he were responsible, because we regard it as a

Stowers v. Hollis by &c.

sound rule, that where any person, even if he be an infant, does that which the law requires of him, he is bound.

The question next arises whether, where a statute places a liability upon him if certain facts are found in the mode prescribed, he can waive that proceeding and admit his liability, and it be enforced by virtue of his contract.

Our bastardy act does not speak of infants. It provides in a general way that the mother may accuse "any person of being the father of the child;" but in *Chandler v. The Commonwealth*, 4 Met., 66, it was held that an infant was liable to be proceeded against under it.

He is liable for his tort. It was held in *Ray v. Tubbs*, 28 Vt., 519, that he was liable upon his note given in satisfaction of a tort, the same as he would have been upon the original cause of action.

The statute provides for an order of filiation; but although an infant, should he not be allowed to waive this and admit his fathership?

If so, as the law then puts upon him the duty of supporting the child, his contract to do so should be upheld. If the legal obligation to do an act exists, he may bind himself by a reasonable contract made for the purpose of discharging that obligation. He merely promises in such a case to do what the law says he shall do. If he executes, for instance, a bond in a bastardy proceeding, he is liable upon it because the law provides for it.

He is bound to pay for necessities furnished to him, or for the support of his wife and children,

and it may be said that generally he is bound by any act which by law he is bound to do. The voluntary performance of an act by him, which could be compelled by law, is binding upon him, and there is no good reason for a distinction if a duty be required of him by statute instead of the general law, nor for excepting an act, like that in question, from the general rule of law, that he is liable like an adult for his tortious act.

If his contract is in discharge of an obligation, which he is by law, either general or statutory, bound to perform, it is valid. A contrary rule would only serve the purposes of fraud and injustice. (*People v. Moores*, 4 Denio, 518; *Bavington v. Clark*, 2 Penrose & Watts, 115.)

In the case of any tort committed by an infant, the fact of his guilt must be fixed by a finding, or an admission of it by him; and when he is charged with having begotten a child, and admits it, and is willing, in consideration that no legal steps be taken against him, and he be not involved in costs and litigation, to undertake to support it, is he still to be compelled to go into court, that a mere order of filiation may be entered? We think not. Such a course would be needless. A mere verdict or finding of fact would not impose the obligation, because it was created at the birth of the child.

Here the law placed upon him the obligation of supporting his child, who was recognized as such by him, and the infancy can not avail to defeat a promise by him which was but the command of the law.

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The question is not now presented whether a court would inquire into the reasonableness of the amount which an infant might attempt to undertake to pay in such a case, or for what length of time, because, in this instance, it was not shown by the testimony that any sum or time were named by him, and the same were fixed by the lower court.

Judgment affirmed.

CASE 77—PETITION EQUITY—JANUARY 19.

Usher's Ex'r v. Flood.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. **STATUTE OF FRAUDS—PAROL CONTRACT FOR SALE OF LAND.**—Mere possession under a parol gift, or a parol agreement for sale, of land will not enable the party in possession to defeat a recovery by the donor or vendor, but entitles him to a lien for the consideration paid, and to such equities as may arise out of the transaction.
2. **RESCISSION.**—Either the vendor or vendee may rescind a parol contract for the sale of land upon equitable principles.
3. **SUFFICIENCY OF "MEMORANDUM."**—A letter to one whom the writer had treated as a son, promising to give him upon his marriage "a house and furnish it," is not a sufficient written memorandum to take the promise out of the statute of frauds, the letter containing no contract, or consideration for the promised gift; nor does the fact that the writer afterward built a house and placed the party in possession convert the letter into an enforceable contract.
4. **CASE ADJUDGED.**—Appellant's testator placed appellee, who had rendered him faithful service for many years, and whom he had treated as a son, in possession of a house and lot under a parol gift, and made a will devising to him the property, but by a codicil afterward revoked the devise. Appellant now seeks to recover the property from appellee.

Held.—That while the testator's affection for the appellee may have prompted his liberality, yet it originated from the faithful services rendered him by appellee for many years, which must be taken

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to be the consideration for the gift, and while appellee can not resist the recovery, he is entitled to a lien for the value of his services less the benefits received.

**BROWN, HUMPHREY & DAVIE AND GOODLOE & ROBERTS
FOR APPELLANT.**

1. Mere possession by a parol donee or vendee of land, will not enable him to defeat an action brought by the owner to recover the possession. None of the cases hold that possession alone is sufficient for *that* purpose; they go no farther than to hold that a court of equity will enforce the defendant's equitable rights. (Nichols v. Nichols, 1 Marsh., 167; Kenny v. Marsh, 2 Marsh., 49; Letcher v. Cosby, 2 Marsh., 107; Lucas v. Mitchell, 3 Marsh., 245; Barnes v. Wise, 3 Mon., 170; McCampbell v. McCampbell, 2 Mar., 112; McCampbell v. McCampbell, 5 Litt., 92; Brown v. East, 5 Mon., 406; Gudgell v. Duvall, 4 J. J. Mar., 229; Ford v. Ellingwood, 3 Met., 359; Park's Heirs v. White's Heirs, 4 Dana, 552; Harron v. Johnson, 3 Met., 579; Cornelison v. Cornelison, 1 Bush, 150; Rucker v. Abell, 8 B. M., 566; Glass v. Abbott, 6 Bush, 423; Richmond and Lexington Turnpike Road Co. v. Rogers, 7 Bush, 535; Holtzclaw v. Blackaby, 9 Bush, 44; Dillon v. Crook & Co., 11 Bush, 325; Stephens v. Reavis, MS. Op., Dec. 17, 1881 [3 Ky. Law Rep., p. 475]; Barfield v. McMurtry, MS. Op., Sept. 24, 1884 [6 Ky. Law Rep., p. 417]; Hayden v. McIlvain, 4 Bibb., 59.)
2. If the consideration for the gift was Flood's marrying, this is as inimical to the statute of frauds as is the agreement to convey the land. (Potts v. Merritt, 14 B. M., 407.)
3. The letter relied on as evidencing a contract to convey is not a sufficient memorandum to satisfy the requirements of the statute of frauds. (Kay & Casey v. Curd, 6 B. M., 100; Ellis v. Desmon's Heirs, 4 Bibb., 466; Fowler v. Lewis, 3 Mar., 445.)
4. The executor having a power of sale but no title, may appeal to a court of equity to declare the ownership of the property to be in the testator, so that it may be fairly sold. (Dean v. Dean, 7 Mon., 810.)

LANE & HARRISON AND E. E. MCKAY FOR APPELLEE.

Brief not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

J. W. Usher at his death left a last will and testament, by which he appointed the appellant, W. F. Pragoff, his executor. The executor filed this petition in July, 1880, for the settlement of the estate, making the creditors and devisees defendants.

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and sought to subject the real estate in controversy to sale for the payment of the debts and legacies.

During the progress of the action the appellees, Michael Flood and wife, who were claiming the realty asked to be sold, consisting of a house and lot in the city of Louisville, were made defendants, and this is a contest between the appellees on the one hand and the estate of Usher on the other, as to the right of property in this realty.

Usher being the owner at one time of the property, and invested at his death with the legal title, it is claimed by the appellees that Michael Flood derived his title from Usher in his life-time, under the following circumstances:

That in the year 1856 he entered into the service of the decedent Usher, and worked and labored for him from that date until the year 1868, at which time he reached the age of twenty-one years; that at the time he began to labor for the deceased the latter promised and undertook with the appellee (Michael Flood) to make payment and provision for his services when he attained twenty-one years of age; that having arrived at the age of twenty-one, the decedent proposed to him, if he would marry his co-appellee (his present wife) that, in consideration thereof and the past services rendered the decedent by the appellee, he, the decedent, would convey to him the lot of land in controversy, build him a house thereon, and furnish it; that he accepted the proposition made by decedent, married his co-appellee, and in a short time thereafter the decedent erected a house on the lot, and furnished

Usher's Ex'r v. Flood.

it, and placed the appellee in possession, in compliance with his agreement, and they have been holding and claiming it as their property in the undisturbed possession until the institution of the present action.

The decedent, Usher, was a bachelor, advanced in years, having no near relatives except his father and mother, who died many years since. He seems to have acquired a great fondness for Mike, taking him to live with him at the age of fourteen years, where he remained from that time until his marriage, which occurred when he was about twenty-four years of age. He treated him in every respect as his son, sending him to school, and learning him business habits; and, on the other hand, the adopted son rendered him faithful service in the conduct of business matters, for which the decedent not only expected to compensate him, but, in fact, did compensate him by giving him the house in controversy, and furnishing it throughout, but supplied Mike with all the necessities of life. An unfortunate disagreement between the two after the marriage of Mike severed their friendly relations, and although the decedent had made one or two wills devising to the appellee the property, the last will, by a codicil annexed, revoked the devise, and left the appellee without any interest in his estate.

That he gave to the appellee the house and lot, and placed him in the possession, is satisfactorily established. That possession was continued in the appellee for near fourteen years, and up to the death of the testator. The decedent had a great desire

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Et hinc ubi hath no more

Peace
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Put up
your sword

that Mike should marry, and agreed with him if he would marry and settle in life, he would give him a house and lot, and from the testimony in the case it is evident that the affection he had for the appellee, and the services rendered the decedent by him, constituted the consideration for the promise. He wrote to the appellee from Paris, France, when informed by Mike that his purpose was to marry, telling him to take Mrs. Harvey and Mr. Pragoff down to see the girl, and if they were pleased with her, he would have no objection. *I will give you a house and furnish it, and will give you a big wedding.* The young lady, in the opinion of one of the two friends, was such a girl as Mike should marry, and as soon as the decedent returned home they were married, and the latter proceeded at once to build the house in accordance with his promise, and placed the young couple in possession. Their first born was named after him, and they were treated by him as a father until the unfortunate disagreement that took place between them shortly before his death. The letter written from France has been lost, but its contents clearly proven by disinterested witnesses.

The statute of frauds is interposed against the claim of title asserted by the appellee. The statute of this State provides with reference to real estate, that "no estate of inheritance or freehold, or for a term of more than one year in lands, shall be conveyed unless by deed or will." (General Statutes, chapter 24, section 2.) And further: "No action shall be brought to charge any person * * *

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upon any agreement made in consideration of marriage, except mutual promises to marry, nor upon any contract for the sale of any real estate, or any lease thereof, for a longer term than one year, unless the * * * contract, agreement * * * or some memorandum * * * thereof be in writing, and signed by the party to be charged therewith." (General Statutes, chapter 22, section 1.)

The doctrine maintained by counsel for the appellee, and upon which the judgment below to a great extent is sought to be sustained, has received the sanction of this court in some of the earlier cases upon the subject, based upon the idea that a parol contract for the sale of land is not void, but that the statute only forbids the bringing of an action to charge any one upon such a contract.

That if the appellee in this case had instituted his action upon the parol agreement to enforce the contract it would have been dismissed, but being in possession, he may use that possession as a defense to prevent the vendor from recovering the realty. •

That the transfer of the possession under a verbal contract, although it does not vest the vendee with title, gives him such a right of possession as can not be disturbed by the vendor; so at last, under such a ruling, the only remedy for the vendor is to convey the land if he desires to collect his purchase money, and notwithstanding the 'statute of frauds, the contract must be enforced. On the other hand, it is insisted, with authority from this court in support of the position, that with the vendee in possession the vendor may tender a conveyance and

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compel the vendee to pay the purchase money. The vendor has by such an application of the statute to the parol contract sold his land, but the vendee has not purchased. The one (the vendor) may enforce it, but the vendee can not, disregarding all the elementary doctrine in regard to contracts that the obligation must be mutual and binding upon both parties in order to make it valid. Much uncertainty exists in the minds of the profession as to what the law really is, by reason of the inconsistent and conflicting opinions upon this question; but in following the later cases, except now and then a dictum, it will be found that such a contract can not be enforced by either party, and its rescission at the option of either must be adjudged upon equitable grounds. To deny the right of the vendee to enforce specific performance and allow the vendor at his option to make the conveyance and compel performance, is a doctrine not sustained by any of the later cases; but the parol contract may be disregarded by both the vendor and the vendee. It may be instructive to notice some of the cases sustaining the view that the vendee is compelled to accept the title. In the case of Barnes, Anderson, &c., v. Wise, 3 Mon., 169, Barnes, who sold to Wise, had no title himself to the lot sold, and Wise, when purchasing from him, agreed to look to White, in whom the legal title was vested, for a deed. It was a chancing bargain; yet the court, in discussing that case, said: "But equity which follows the law, and repels the absurdity of enforcing a contract which the law disregards, will not specifically decree the performance

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of such a contract," but proceeded, however, to say that "such a contract is good in the mouth of a defendant as a matter of defense," and that "in a defensive attitude such contract should be his shield, and its obligation be acknowledged."

If a party to such a contract makes himself a complainant, his case is hopeless; if a vendee in possession, he may defend when that possession is about to be disturbed; and in *Roberts v. Tennell*, 3 Mon., 247, the difference between holding a contract void and declaring that no action can be maintained upon it, is attempted to be shown upon the same reasoning as found in *Wise v. Barnes*.

In the case of *Letcher v. Cosby*, 2 Marshall, 106, it was held that the contract afforded a valid ground of defense, arising from a moral obligation that a court of equity would lend its aid to enforce.

In *Lucas v. Mitchell*, 3 Mar., 244, this court said: "It is undoubtedly true that the statute has taken away the remedy to enforce such a contract, but it is equally true that it does not avoid the contract, nor destroy the moral obligation to comply with it on the one side, or the correspondent right which results from it on the other;" and the court proceeds to determine that, for the purposes of defense when the claim is sought to be enforced, the statute is not in the way.

In *Park's Heirs v. White's Admr's*, 4 Dana, 552, it was said "that a parol gift of land, though not enforceable by law, is not illegal or void. The donor is, in morality and good conscience, under the same duty to respect it and perfect it, if necessary, as if it were in writing."

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As late as the case of Ford v. Ellingwood, 3 Met., 359, this doctrine has been enunciated, and proceeds upon the idea that the party in default is in good morals bound to comply with his contract, and a vendee in possession may defend on that ground, and prevent a recovery by the vendor of the land sold. If, however, the vendee wants to rescind when in possession, he is not allowed to do so unless the vendor is willing; for if the vendor tenders a deed in accordance with the contract, the vendee must accept. The later, and, in fact, some of the earlier cases, recognize a different rule.

In the case of Grant's Heirs v. Craigmiles, 1 Bibb, 205, it is said, "that some judges have thought that another kind of evidence was equivalent to written evidence, such as paying the consideration, being let into possession, making valuable improvements, etc. * * * The same fraud and perjury which can conceive and prove the agreement by parol, can also prove the performance in part; * * * but where the law is known, the party who fails to get the land agreed for because he is without the evidence required, must take the blame on himself, for it is his own folly or negligence that has made him part with his money in expectation of the land, or *e converso*, the possession of the land in expectation of the price, without the requisite evidence and in the very teeth of the statute."

If the party in possession may by parol evidence establish a contract for the sale of land to defeat an ejectment, or the recovery by the one holding a perfect title, the mischief intended to be provided

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against by the statute is disregarded, and the owner of an undoubted title denied the right to his land, because the defendant has shown by parol that he entered as purchaser. The earlier cases, or some of them in this court, sustained the judgment below, denying the right of the vendee to resist a recovery of the purchase money notes, because at law the entry upon and the possession by him constituted a consideration, and from that originated the doctrine that the vendor could tender a deed and compel the vendee to accept, and if he failed to do so, the possession by the vendee under the parol contract would defeat any attempt by the vendor to recover the land. In *Curnutt v. Roberts*, reported in 11 B. M., 42, Roberts sold to Curnutt by parol contract his right to certain land for which the latter agreed to pay him thirty dollars. Roberts tendered a deed and sought to recover the purchase money, and for which a judgment was rendered in the court below. Judge Simpson delivering the opinion of the court, said:

“The question presented is, substantially, whether a vendor, when the contract for the sale of land is simply verbal, and not reduced to writing, can at his option, by tendering an execution of the contract upon his part render it valid and enforceable, notwithstanding, at the time it was entered into, it was within the operation of the statute of frauds, and no action could be maintained upon it by either party. If such a right exists in the vendor, it in effect places it in his power, at his election, to make every verbal contract for the sale of land

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binding on the parties, although no such right exists in the vendee. * * * A verbal contract for the sale of land is not legally obligatory upon either party, until some writing evidencing the sale, and sufficient to take the contract out of the statute of frauds, is executed by the vendor and accepted by the purchaser."

In *Murray v. Pate*, 6 Dana, 335, in speaking of the effect of the parol contract, it is said: "It is not legally obligatory on either party until a deed conveying the land, or some other writing evidencing the sale and binding the vendor, was actually accepted by the purchaser. * * * The parol agreement to sell and convey the land being unobligatory on the vendor formed no consideration for the promise to pay the price, or to accept the deed. To say that the purchaser is bound to accept the deed which will bind him to pay the money, would be to hold him bound by the contract at the will of the vendor who is not bound, and would enable the vendor to maintain an action against the vendee for the non-acceptance of the deed and for the non-payment of the money, while the vendee could not, by paying or tendering the money, have an action against the vendor."

In the case of *Speers v. Sewell*, reported in 4 Bush, 239, the father made an oral contract with the son, whereby he agreed to convey to John his homestead tract of land in consideration of John's living with him, attending to his business, and taking care of him and his wife during their lives. John was in the possession, and after the death of his father

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and mother an action was instituted for a partition of the land, etc.

This court, through Judge Robertson, said: "As there was no written memorial of the contract for the conveyance of the homestead land to the appellant John, he could not by suit enforce a specific performance even on the meritorious ground of the strong moral equity resulting from his long and faithful services in executing the promised consideration, but he has a resisting equity not affected by the statute of fraud and perjuries. For his services he has an equitable lien on the land, and can not justly be required by a court of equity to surrender his rightful possession of the land until he shall have been indemnified. If the appellees avoid a conveyance they must do so *cum onere*."

An account of the value of John's services was ordered, and his possession directed to be protected until the amount allowed him was paid. The conclusion in that case is the correct and proper solution of this question. Either party, the vendor or the vendee, may rescind the contract upon equitable principles. If the vendor refuses to convey, an account for improvements will be taken, and if any purchase money has been paid, the whole will constitute a lien upon the land, and if the vendee refuse to accept the deed, he will be accountable for rents. The equities, however, to which either party may be entitled must necessarily be determined by the facts of the particular case.

In the case of the Richmond and Lexington Turnpike Road Co. v. Rogers; 7 Bush, 532, the

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same doctrine is announced, followed by the MS. opinions of *Stephens v. Reavis*, December 17, 1881, and *Barfield v. McMurtry*, September 24, 1884. It results, therefore, that the appellee can not defeat the right of recovery upon a mere possession under a parol agreement for sale as against the vendor, who exhibits a perfect title. He is entitled to a lien for the consideration paid, and to such equities as may arise out of the transaction. This must now be regarded as the settled doctrine on the subject.

There is yet another question presented by the record, upon which it is urged the judgment below can be maintained. The letter written by Usher, the decedent, while in Paris, it is said, takes this case out of the statute of frauds, and while lost, its contents have been established. This letter reads:

"MY DEAR BOY: You wrote me that you were going to engage yourself to a young lady. If she is a nice and sensible girl, I have no objection. Take her down to see Mrs. Harvey and Mr. Pragoff, and if they are suited with her, I will give you a house, and furnish it, and will give you a big wedding."

It does not appear whether the young lady suited both of these friends or not; but as soon as Mr. Usher returned from Europe he saw the girl, was pleased with her, the marriage took place, the house was built, and the young couple took possession as their property. The proof, we think, establishes the gift. This memorandum contained no contract or any consideration for the promised gift, and could not have been enforced by the appellee either before

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or after the marriage. It may and does conduce to sustain the verbal gift, but is evidence for no other purpose. If the appellee ^{any, testator} had failed to purchase or build a house, no action could have been maintained on this letter, and the mere fact that he afterwards built a house and placed them in the possession does not convert that into a written contract that before was a mere nullity, or only such a promise as any father would, in all probability, have made the son on the eve of marriage.

It does appear, however, from this proof, that a parol gift was made, and the appellee placed in the possession, and enjoyed the use of the property for many years. It further appears that the appellee, Michael Flood, had been in the employ of the decedent for many years, and was the foreman or general superintendent of his business—that his services were valuable and formed the consideration for the gift of the house and lot. His affection for the appellee may have prompted the liberality on the part of the decedent, all of which, however, originated from the faithful service rendered him by Mike for many years.

He, it is true, went to night school, and was sent to St. Louis to school for two sessions; but we find no other consideration for the services but the occupancy of the house and the kindness of the decedent in furnishing the house and the groceries. Were not the services more valuable than the compensation? and if so, in attempting to take from the appellee this property, the appellants must account to Mike for the value of his services, less the benefits received.

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If a bare subsistence for himself and family under the circumstances was sufficient compensation, he can recover nothing. If more, then he should be allowed to assert his claim, to be made alone out of the property, and not to exceed its value.

We have assumed that there was a parol gift, and we think the proof establishes that fact. The case should go to a commissioner to take proof as to the value of appellee's services, and the sum, if any, allowed Mike, should be enforced as a lien on the property sought to be recovered. If the appellee had paid the purchase money the Chancellor would have enforced the lien, and if paid for in services rendered, to the extent of the value of such services the lien should be enforced as in the case of *Spears v. Sewell*, 4 Bush, 239.

The judgment below is therefore reversed, and cause remanded for proceedings consistent with this opinion.

CASE 78—INDICTMENT—JANUARY 21.

Stricklin v. Commonwealth.

APPEAL FROM WOLFE CIRCUIT COURT.

1. **ACCESSORY INDICTED FOR MURDER.**—An indictment in which the offense charged is murder is good, although the particular circumstances of the offense, as set forth therein, constitute an accessory before the fact, and not a principal.
2. **EVIDENCE.**—Upon the trial of appellant for the murder of her husband, as an accessory before the fact, the court did not err in admitting as evidence letters written for the accused, and at her request, to the man charged with the murder of her husband as

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principal, the letters revealing a guilty love for the man, and, therefore, furnishing a motive for the act.

A. DUVALL FOR APPELLANT.

1. The facts alleged in the indictment do not sustain the charge of murder. They render the defendant liable simply as an accessory before the fact. (*Able v. Commonwealth*, 5 Bush, 698.)
2. It was error to admit in evidence against the defendant letters written by another upon the statement of the writer that they were written with the knowledge of the defendant.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant was tried, convicted and sentenced to the penitentiary for life under the following indictment:

"The grand jury of Wolfe county accuse Elizabeth Stricklin of the offense of murder, committed as follows: The said Elizabeth Stricklin, in the county aforesaid, on the 29th day of April, 1885, did feloniously, willfully and with malice aforethought, kill and murder Payton Stricklin, by confederating and conspiring with Floyd Williams, and aiding and abetting, counseling him, the said Williams, to kill and murder the said Payton Stricklin, and that in pursuance to said conspiracy confederation, did counsel and advise, the said Floyd Williams did, feloniously and with malice aforethought, thereafter kill and murder the said Payton Stricklin by shooting him with guns and pistols, loaded with powder and balls, or other hard and combustible substances, the said Elizabeth Stricklin being accessory thereto, and aiding, abetting, counseling, assisting therein as aforesaid, etc."

One of the grounds relied on for reversal is, that appellant is improperly charged with the offense of murder, and on that account the demurrer to the indictment ought to have been sustained.

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The indictment is inartificially drawn, but the facts stated, if true, constitute appellant an accessory before the fact, and we think she was, therefore, in legal contemplation, guilty of murder, if guilty at all.

Bishop on Criminal Law, volume 1, section 631-2, correctly says:

"Since an act by an agent has in law the effect of a personal act, if one employs another to do a criminal thing for him he is guilty of the same as though he had done it himself. By this sort of reasoning we reach the conclusion that every person whose corrupt intent contributes to a criminal act in a degree for the law's notice is in law guilty of the whole crime."

And as said in section 673: "The distinction between such accessory (before the fact) and a principal rests solely on authority, being without foundation either in natural reason or the ordinary doctrines of the law. The general rule of law is, that what one does through another's agency is to be regarded as done by himself."

The Criminal Code keeps up and clearly defines the distinction between the offense to be charged in an indictment and the particular circumstances of the offense charged. In the commission of the offense of murder there may be an accessory before the fact as well as a principal; but both are in law guilty of the offense, and by our statutes their punishment is made the same. But whether the person charged with the offense of murder be guilty as principal or accessory depends upon the particular circumstances

of the offense charged, that is, whether he, being present, actually committed or aided and assisted in committing the homicide, or not being present with a felonious intent, incited, procured or advised it.

It was not, therefore, a departure from the rules of pleading prescribed by the Criminal Code to denominate the offense with which appellant was charged in the indictment as murder. For if she, being an accessory before the fact to the murder of her husband, was not guilty of that offense, she was not in the eye of the law guilty of, nor could she be charged with, any specific crime denounced by the statute.

Counsel calls our attention to the case of *Able v. Commonwealth*, 5 Bush, 698, where the accused was indicted, tried and convicted as principal in stealing and carrying away money, when the evidence clearly showed him to be guilty as accessory before the fact.

We do not understand this court to have reversed the judgment of conviction in that case upon the ground that the defendant was charged with the offense of larceny, but rather because the particular circumstances of the offense as stated in the indictment made him a principal, when the evidence clearly showed he was an accessory and not a principal.

The Criminal Code requires that the indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with

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such reasonable degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case.

We think the circumstances are in this case stated in the indictment in such manner as to enable a person of common understanding to know that it was intended to charge appellant as accessory to the murder; for it is in substance stated that she feloniously counseled and advised Floyd Williams to murder Payton Stricklin, and that he did in pursuance thereof commit the murder, and it is in terms stated she was accessory thereto.

We do not think the court erred in admitting as evidence the letters written for appellant, and at her request, by the sister of Floyd Williams, to him while he was confined in the jail of another county.

Appellant requested the letters written, assented to what was said in them, and adopted them as the expression of her feelings, and directed them to be sent to him. She did not write them herself, because she was illiterate, and did not cause her own signature to be put to them, because she did not wish it known she was in correspondence with him. The letters reveal a guilty love for Williams, and were competent evidence as to the motive he had in taking the life of her husband, and of her connection with the crime.

The instruction which counsel complains of is, like the indictment, awkwardly drawn, but we do not think the jury were misled by it, or that they could have understood it as directing them to convict upon

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any other hypothesis than her guilt as an accessory before the fact; for they were, in substance, instructed not to find her guilty unless they believed the murder was committed, and that she feloniously aided, assisted or advised him to commit it.

Perceiving no error in this case to the prejudice of appellant's substantial rights, we must affirm the judgment.

CASE 79—PETITION EQUITY—JANUARY 21.

Ralston v. Moore, &c.

APPEAL FROM BARREN CIRCUIT COURT.

1. **MORTGAGE—MISTAKE IN CERTIFICATE CORRECTED.**—Where the clerk, in writing out the certificate to a mortgage which has been acknowledged before a deputy, fails to set forth the facts and include the indorsement made on the mortgage by the deputy, the mistake may be corrected.
2. **CURATIVE STATUTE.**—The act of May 10, 1884, cures such defective certificates, but that act can not affect a judgment rendered prior to its passage.

W. L. PORTER FOR APPELLANT.

1. In an action to enforce a mortgage lien, to entitle husband and wife to claim a homestead in the mortgaged property, they must allege specifically that they are *bona fide* housekeepers in this State, and reside upon the land in which they claim a homestead. (General Statutes, article 8, section 16, page 484.)
2. The clerk's certificate of the acknowledgment of a mortgage is merely a matter of evidence, and a mistake therein should not be allowed to prejudice the rights of the parties, and should at any time, in furtherance of justice, be corrected. (*Lyne v. Bank of Kentucky*, 5 J. J. Marsh., 558; General Statutes, section 17, chapter 81, page 684; *Worley v. Tuggles, &c.*, 4 Bush, 168.)

W. P. D. BUSH ON SAME SIDE.

1. In the absence of any evidence that the value of the mortgaged

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property was less than one hundred dollars, it was error to adjudge that appellant's mortgage gave him no lien.

2. The act of May 10, 1884, cured the defect in the clerk's certificate of acknowledgment.

BOTTS & HILL AND A. DUVALL FOR APPELLEES.

Briefs not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This action was instituted by the appellant to enforce a mortgage lien executed by the appellees, Moore and wife, on several tracts of land.

The mortgage was acknowledged before a deputy clerk, and recorded in December, 1875. The defendants claim a homestead in the land, and rely upon a defective certificate annexed to the deed, and recorded with it, as sustaining their defense.

The evidence or certificate of acknowledgment was made by J. M. Renfro, D. C., for J. P. Nuckols, in these words: "1875, Nov. 30; acknowledged by E. Moore and wife. J. M. Renfro, D. C., for J. P. Nuckols, C. B. C. C."

This indorsement is on the back of the mortgage, and was there when the principal clerk wrote out the certificate, but failed in the certificate to set forth the facts, and include in the certificate the indorsement made on the mortgage by the deputy, and that said deputy failed to write out the certificate of acknowledgment himself.

The appellant, the mortgagee, for reply to the answer setting up the defense, alleged that the failure to insert the memorandum of acknowledgment made by the deputy was a mistake on the part of the clerk, and asked that it might be corrected. The

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mistake is clearly shown by the clerk, and, in fact, the indorsement was on the mortgage when recorded by the clerk. That it was acknowledged by the husband and wife is evident, and the oversight of the clerk is alone relied on to defeat the mortgage lien.

Here is something to amend by, and that of itself shows the mistake. The clerk is not attempting to supply words omitted from his own certificate, necessary to make the mortgage valid as to the wife, but has said that I failed to copy that which appeared on the face of the writing, and which was made my duty to make part of my certificate when I recorded the instrument. We perceive no reason why such a mistake should not be corrected; in fact, the statute provides that the certificate of the officer shall not be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer. The clerk is not contradicting his own certificate by showing that he did something more than appears from the record, but the appellant is made to lose his lien because the clerk failed to insert in his certificate that which was indorsed on the mortgage when he entered it of record.

The mistake is as plain as if he had omitted from the record the name of one of the grantors or the grantee. The mistake appears upon the instrument itself, and we see no reason why it should not be corrected. The act of May 10, 1884, cured such defective certificates, but this cannot affect proceedings instituted in 1882, with a judgment prior to

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the passage of the act; nor was there anything in the record showing that the lands were worth less than one thousand dollars, and for that reason the judgment should be reversed. On the return of the cause, nothing else appearing in the case, a judgment should be entered enforcing the lien.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

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CASE 80—PETITION ORDINARY—FEBRUARY 2.

Blackerby v. Continental Ins. Co.

APPEAL FROM HENRY CIRCUIT COURT.

1. THE CONDITION IN A POLICY OF INSURANCE that the company shall not be liable for any loss or damage under the policy, if default shall have been made in the payment of any installment of premium due by the terms of any installment note, is valid, although by the terms of the contract the premium notes of the insured remain binding upon him.
2. PAROL TESTIMONY TO VARY WRITING—PLACE OF PAYMENT OF PREMIUM.—The rule that parol testimony is inadmissible to vary or contradict the terms of a written contract does not apply where the original contract was verbal and entire, and only a part of it has been reduced to writing.

Where neither the policy of insurance nor the obligation of the insured fixes a place for the payment of the premium, or names the person to whom it must be paid, parol evidence is competent to show the agreement between the insured and the agent who effected the insurance as to the place of payment.
3. CASE ADJUDGED.—A citizen of this State took out a policy of insurance, through a local agent, with a foreign company having its principal office in New York city, a branch office for the Western Department in Chicago, and a local agent in this State. Both the policy and the premium note of the insured were silent as to where and to whom the premiums were to be paid, but the local agent,

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taking the risk, told the insured that he would be notified how and to whom to make the payments, and that he must not make them in any other way. The obligation of the insured was to pay *by mail if requested*. He was never notified to whom to make payments, and was in default when the property burned.

Held—That under all the circumstances the insured had the right to believe that the agent had the authority to instruct him as to the manner of paying the premiums, and the company, by its course of business and conduct, having produced such a belief, can not be allowed to claim a forfeiture of the policy because the insured has acted upon it.

CARROLL & BARBOUR AND E. J. TYLER FOR APPELLANT.

1. A provision in a contract of insurance that, on default of payment of any installment of a premium note, the policy shall lapse, and the whole amount of premium be considered as earned, is invalid for want of mutuality. (*Montgomery v. Phoenix Mut. Life Ins. Co.*, 14 Bush, 60.)
2. The rule that parol evidence is not admissible to vary or contradict the terms of a written contract, does not apply when the writing is silent as to certain conditions of the contract, or as to the time or manner of the performance of certain conditions. In such a case, the verbal statements of the person making the contract, or of his agent, may be admitted to show the nature of the omitted condition, or the time and manner of its performance. (*Jackson v. Aetna Ins. Co.*, 16 B. Mon., 259; *Johnson v. Southern Mutual Life Ins. Co.*, 3 Ky. Law Rep., 26.)

STEPHEN D. PARRISH FOR APPELLEES.

1. Failure to pay one installment of a premium note renders a policy absolutely void, unless revived by written permission of a superintendent of the company. Such a provision in a policy of insurance is valid and binding.

Premiums paid by installment notes do not materially differ from premiums paid by cash in advance, the only difference being in the time of payment. The rights of the parties and the liability of the insured in case of forfeiture are the same in either case. (*Williams v. Albany City Ins. Co.*, 19 Mich., 451, 469; *Watrows v. Miss. Valley Ins. Co.*, 35 Iowa, 582; *Muhleman v. Nat. Ins. Co.*, 6 W. Va., 508, 523; 100 Mass., 500; *Beadle v. Chenango Ins. Co.*, 3 Hill, 161; *Gorton v. Dodge Co. Ins. Co.*, 39 Wis., 121; 7 Hill, 49; *Roberts v. New England Ins. Co.*, 1 Disney, 355; 3 Disney, 106; *Wall v. Home Ins. Co.*, 36 N. Y., 157; *J. M. Bailey's Ins. Brief*, page 55; 3 Kent's Com. page 341; 8 Johnson, 1; 4 Duer, 141.)

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2. The company is not bound to notify the assured of the time, place and manner of paying each installment. The assured is bound to take notice of them. (Sheppard's Touchstone, page 136; Coke on Littleton, 210 a, b; 1 Disney, 835; 2 Disney, 196; Poole v. Tumbridge, 2 Mees. & W., 223; May on Insurance, section 341; Thompson v. Ins. Co., 104 U. S. Rep., page 258; McIntire v. Michigan State Ins. Co., Mich. S. C., Dec. 20, 1883; Mandego v. Centennial Mut. Life Ins. Co., Supreme Ct., Iowa, 1884; Ins. Co. v. Davis, 95 U. S., 425.)
3. The verbal statements of the agent of an insurance company constitute no part of the original contract, and do not bind the company. Such statements are not admissible to show the nature or effect of conditions in regard to which the original contract is silent. (Ins. Co. v. Mowry, 96 U. S. Rep., 545; Bigelow on Estoppel, 487, 481; Adler v. Friedman, 16 Cal., 188; Abbott on Trial Evidence, page 486; Ill. M. F. Ins. Co. v. O'Neil, 13 Ill., 89; Aetna Insurance Co. v. Barnes, MS. Op., Ky. Ct. App., Nov. 18, 1874; 8 B. M., 634; Madison Ins. Co. v. Fellows, 1 Disney, 217; May on Insurance, 511; Marvin v. Ins. Co., 85 N. Y., 278; 2 Crompt. & J., 244; Grace, &c., v. Ins. Co., 109 U. S., 281; 1 Greenl. Ev., section 275; Mosely v. Hanford, 10 B. & C., 729; Coombs v. Charter Oak Ins. Co., 65 Maine, 382.)
4. The assured must inform himself concerning the scope and extent of the authority of the agent with whom he deals. The declarations of the agent are not evidence of his authority. (James v. Starkey, 1 Wash. (1 U. S. C. C.), 380; 40 Mo., 557; 42 Mo., 456; Viele v. Germania Ins. Co., 28 Iowa, 54; 8 Bush, 133.)

JOHN D. CARROLL ON SAME SIDE.

1. Stipulations in regard to the payment of premiums are essential parts of the contract of insurance, and if they are not fulfilled by the insured, no recovery can be had against the company on the policy. (Williams v. Albany City Ins. Co., 19 Mich., 451, 469; Watrows v. Miss. Valley Ins. Co., 35 Iowa, 582; Wall v. Home Ins. Co., 100 Mass., 500; Roberts v. New Eng. Ins. Co., 1 Disney, 355; Grigsby v. St. Louis Mut. Life Ins. Co., 10 Bush, 314.)
2. Parol evidence can not be admitted to vary or contradict the terms of a written contract, and an insurance company is not bound by the statement of its local agents in regard to the conditions of the policy, nor by his agreement in regard to the terms of the contract. (Galbraith, Adm'r, v. Arlington Mut. Life Ins. Co., 12 Bush, 35; Sands v. Hill, 42 Barb., 451; Rogers v. Atkinson, 1 Georgia, 12; Adler v. Friedman, 16 Cal., 188; 1 Greenl. Ev., section 203; Willey v. Hall, 8 Clark, Iowa, 66.)
3. The parol agreement of the agent, independent of the original contract, is not a valid contract, because without consideration.

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4. The company is not bound to give notice of the time and place for payment of premiums. (*Roberts v. New Eng. Life Ins. Co.*, 1 Disney, 855; *Sanders v. Merton*, 4 Maine, 475; *Bain v. Wilson*, 1 J. J. Marsh., 202.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The policy of insurance issued by the appellee, the Continental Insurance Company of the city of New York, to the appellant, Samuel J. Blackerby, contains this provision:

“This company shall not be liable for any loss or damage under this policy, *if default shall have been made in the payment of any installment of premium due by the terms of the installment note.* On payment by the assured or assigns of all installments or premiums due under this policy, and the installment note given thereon, the liability of this company on this policy shall again attach, provided written consent of the superintendent of the western department be first obtained, and this policy be in force from and after such payment, unless this policy shall be void or inoperative for some other cause. *But this company shall not be liable for any loss happening during the continuance of such default of payment,* nor shall any such suspension of liability under this policy on account of such default have the effect of extending such liability beyond the period of its termination, as originally expressed in writing hereon. It is further provided that no attempt, by law or otherwise, to collect any note given for the cash premium, or any installment or premium due upon any installment note, shall be deemed a waiver of any of the conditions of this

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policy, or shall be deemed in any manner to revive this policy; but upon payment by the assured or his assigns of the full amount due upon such note and cost, if any there be, this policy shall thereafter be in full force, unless the same be inoperative or void from some other cause than the non-payment of such note."

The premium or "installment note" which the appellant executed to the company reads thus:

"For value received in policy No. B, 219,992, dated the thirteenth of March, 1879, issued by the Continental Insurance Company, of New York, I promise to pay said company or order (*by mail if requested*) fourteen dollars and forty cents upon the first day of March, 1880, and fourteen dollars and forty cents upon the first day of March, 1881, and fourteen dollars and forty cents on the first day of March, 1882, and fourteen dollars and forty cents on the first day of March, 1883, without interest; and it is hereby agreed that in case of the non-payment of any one of the installments herein named at maturity, the policy for which this note was given shall cease and be void until revived by written permission of the Superintendent of the Western Department, Continental Insurance Company, and the whole amount of installments remaining unpaid on said policy shall be considered as earned."

The company for defense to the appellant's claim for a loss, which occurred on June 8, 1880, rely upon the fact that the installment of premium, which was due on March 1, 1880, had not been

paid when the fire occurred; and that by the failure to pay it the policy became *ipso facto* void.

Upon the other side, it is urged that the company can not now claim that the policy ceased with the non-payment of the premium installment, because it yet holds the obligation for the entire premium; and that unless it surrenders it, it can not ask that the policy be considered as forfeited, because otherwise there would be no mutuality of obligation.

It is well settled, however, that a condition like this one in a policy of insurance is valid; and that in case of a breach of it by the insured, *without a valid excuse*, the obligation of the insurer is at an end, although the premium note of the insured remains binding upon him. The parties have the right to make their own contract, and to fix its terms and conditions; and unless they are illegal or in violation of public policy, they will be upheld. In this instance they could have agreed upon a higher rate of premium; and they had an equal right to agree that the period of time to be covered by the insurance should become shorter upon some contingency, without altering the amount of the premium—especially would this be reasonable and just as to any contingency, which the legal duty of the insured requires him to, and which he can prevent.

Any other rule would require the insurer to carry the risk, although the insured was at the same time violating the contract without excuse; and to require the company to waive its right to the premium, before it could insist upon a release from the

risk, brought about by the failure of the insured to perform his part of a contract executory upon both sides, would establish a rule in favor of the latter resting upon his own default and a violation of his legal duty. If he pays the entire premium in advance, or fails to pay it *ad diem* or at maturity, as he has contracted, the law will not relieve him when the forfeiture of the policy arises from his own neglect.

It is vital to the existence of fire insurance companies, and the interest of both the stockholders and policy-holders, that the patrons should be prompt in the payment of their premiums; and upon the other hand, the insurer should be held to a just performance of the contract; but if the insured, without sufficient excuse, has failed to comply with the conditions which constituted the consideration for the undertaking of the company, his complaint in case of a subsequent loss can not be heard.

If he neglects to pay his note without a valid excuse, it is a violation of his plain duty, and if a subsequent loss occurs, he has no right, upon any legal or equitable principle, to reimbursement. (Wall, &c., v. Home Ins. Co., 36 N. Y., 157; Williams, &c., v. Albany City Ins. Co., 19 Mich., 451; Muhleman v. Nat. Ins. Co., 6 W. Va., 508; Watrous v. Ins. Company, 35 Iowa, 582.)

While, however, the time of payment of a premium is of the essence of a contract of insurance, and while the conditions of a policy, which the courts regard as valid, can not be held to be meaningless, or be avoided, save for a sufficient cause,

yet forfeitures are not regarded with favor. The belief long prevailed that the insurance business could not be carried on without the power to impose the most stringent conditions for delinquency, owing to the fact that prompt payments constitute its very life; and while this is so, yet more liberal views have properly obtained of late, and the contract will be liberally construed as to the insured. We do not mean by this that the law will not uphold a condition in a policy which is not illegal and contrary to public policy, but that a court will seize hold of a reasonable excuse to avoid a forfeiture.

If, for instance, the insured can show some reasonable excuse for non-payment of the premium, based upon the conduct of the insurer, the policy will not be regarded as forfeited. In this instance neither the policy or the obligation of the insured fixed a place for the payment of the premium, or named the person to whom it must be paid. The appellant is a citizen of this State; the appellee is a foreign company, with its principal office, as the policy shows, in New York City, a branch office for the western department in Chicago, Illinois, and a local agent in this State. It is urged that, under these circumstances, the appellant, to avoid a forfeiture of his policy, was bound to know that his note was at the Chicago office, and to make payment there. We see no reason, however, why, from the contract (and the indorsement upon the back of it is no part of it), the insured would not have had a better right to suppose that it must be paid at the New York office.

What, however, was the expectation and intention of the parties to the contract? In view of their situation and the attending circumstances, it is unreasonable to suppose that it was contemplated that the appellant should be compelled, when the appellee had an agent or agents in this State, to go out of it and make his payments in a distant State and hundreds of miles away. Let us see how this would work. A few companies, located in the large cities of this country, control the insurance business. They solicit it in every State of the Union, and conduct it by local agents, who obtain the insurance, make the contracts for it, and receive the premiums. This is now the universal custom. Suppose, contrary to this general practice, that the premiums had to be paid at the home or some distant office, and that no local agents, to whom the premiums could be paid, were accessible. Would not this greatly decrease the number of risks, as well as inconvenience the public? These considerations have induced a course of business upon the part of the insurance companies which authorizes a general belief that the premiums can be paid at home, and that the insurer does not expect payment at the home office.

It is noticeable that in this instance the obligation says:

"I promise to pay said company or order (*by mail if requested*)," etc. Why was the condition inserted that the insured was to pay "*by mail if requested*" by the company, unless it was the understanding and expectation of the parties to the policy, that unless this request was made, the com-

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pany would provide some agent in this State who would receive the premiums? It seems to us that a fair construction of the contract requires this interpretation; and as the insurer did not do so, the insured was not in default.

The appellant offered to file an amended petition, and did file a reply, in which he alleged that he was ready to pay the premium, but that the company had not notified him how or to whom to pay it, and that he did not know to whom it should be paid; that the local agent of the appellee, when he delivered the policy to the appellant, and when the latter executed his obligation to the company, and thereafter and before the installment fell due, told him that he would be notified how and to whom to make the payments, and "that he must not make them in any other way."

An objection to the filing of the amended petition and a demurrer to the reply were sustained, and hence their allegations must be taken as true; and we must be understood in what we have above said as assuming the matters therein alleged as facts. It is urged, however, that any evidence of such an agreement with, or notice from the appellee's agent, would not be admissible. The written obligation is, however, silent as to any place of payment; its terms presumptively show that the appellant was not to seek the appellee out of the State to pay his premium, and the agreement with the company's local agent as to payment was made with the one who had effected the insurance with him, and fixed the time and amount of the payments.

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It is true parol testimony is inadmissible to vary or contradict the terms of a written contract; but this rule does not apply where the original contract was verbal and entire, and only *a part* of it has been reduced to writing; for instance, it may be shown by parol when a written promise without date was made. The parol evidence, in this instance, of what the agent said to or agreed with the insured as to payment, was competent, because no stipulation of the policy was waived or contradicted by it, and the appellant had the right, under all the circumstances, to believe that the agent had the authority to, and that he had the right to rely upon him to instruct him as to the manner of paying the premiums, and the company, by its course of business and conduct, having produced such a belief, can not be allowed to claim a forfeiture of the policy because the insured has acted upon it.

Judgment reversed, with directions to allow the amended petition to be filed, overrule the demurrer to the reply, and for further proceedings consistent with this opinion.

CASE 81—CONTESTED WILL—FEBRUARY 4.

Sharp, &c.; v. Wallace, &c.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

AN UNATTESTED CODICIL, although wholly in the handwriting of the testator, can not bring into operation as a will a paper which is neither in the handwriting of the testator nor attested as required by the statute.

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ELLIOTT AND HEMINGRAY FOR APPELLANTS.

(Brief not in record.)

KOHNS AND BARKER FOR APPELLEES.

1. In the absence of a motion for a new trial the court can consider nothing except the sufficiency of the petition. (*Helm v. Coffey*, 80 Ky., 776; *Lynch v. Stapleton*, 4 Ky. Law Rep., 985; *Arstman v. Thoma* (Superior Ct.), *Ibid*, 480.)
2. The codicil and the original will are to be considered together as one instrument, and as this instrument is neither wholly in the handwriting of the testator nor attested by witnesses, it can not be admitted to probate as a will. (Gen. Stats., chap. 113, sec. 5; *Beall v. Cunningham*, 3 B. M., 390; *Armstrong v. Armstrong*, 14 B. M., 273; *Williams on Executors*, vol. 1, page 179.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The paper in contest in this case purports to be the will of Evelina J. Sharp, is dated January —, 1867, and subscribed by her; but though, formally stated in the attestation clause above her signature to have been done, it never was, in fact, either subscribed or acknowledged by her in the presence of attesting witnesses, nor was it wholly written by her. It, therefore, manifestly has no independent efficacy as her will.

But it appears that subsequently she wrote on the same sheet of paper, and subscribed what was evidently intended by her as a codicil to the instrument mentioned, and to which she refers in the following words: "Codicil, August 31, 1870. After examining this will, I wish to add in my own handwriting the following codicil." She then proceeds in the codicil to direct that a certain farm in the State of Missouri be rented and improved ten years before it is sold, and divided among her heirs, to make a conditional gift to a church, and to provide that

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any child or grandchild who may oppose any settlement made by her as executrix of her deceased husband, or institute suit against her or her sureties under the pretext of getting his rights, shall receive five dollars only of her estate.

The question presented to us for consideration is, whether the instrument purporting to be a codicil, which was wholly written and subscribed by her, and, therefore, itself executed in one of the modes prescribed by the General Statutes, has the effect to set up and give validity to the paper dated January, 1867.

Clearly the reference made in the codicil to the preceding instrument is definite and certain enough to identify it. It must be also admitted that she intended the two as her will, and believed they would be valid as such; and if the codicil had been subscribed or acknowledged by her in the presence of two credible witnesses, who subscribed their names thereto in her presence, it would, according to the construction heretofore given to the statute of wills by this court, have had the effect to give validity to the preceding unfinished instrument as her will; for that question was thoroughly considered in the case of *Beal v. Cunningham*, 3 B. M., 390, and may be now regarded settled.

In that case the following language was used:

"A codicil is a part of the will to which it is attached or refers, and both must be taken and construed together as one instrument. The codicil recognizes the existence of the original, changing it in part and affirming it in those parts in which it is

not altered; and hence it has been well established that a codicil executed with the solemnities required by the statute for passing lands is a republication of a will, *and both taken together make but one will*, and that such republication will have the effect to pass lands acquired after the date of the will, but before the date of the codicil, or to revise and give force and operation to a revoked will."

It was contended by counsel in that case, that though a codicil duly executed might operate as a republication of a revoked will which had been duly executed, it could not have the effect to bring into operation as a will a paper which had never been signed or executed as such. But said the court: "We can see no difference in principle in the cases. * * * If the codicil can so ingraft itself upon and draw within its operative influence a revoked will as to amount to a republication, we can not perceive why it may not ingraft itself upon and draw within its operative influence any instrument which the testator may treat as his will, so as to amount to a republication of the whole as his will."

In *Davis's Heirs v. Taul*, 6 Dana, 51, it was held that when a codicil operates as a republication of the will, the whole is to be construed together as if the will had been *then* written and executed." And in *Armstrong v. Armstrong*, 14 B. M., 333, the court said: "A codicil is in legal effect a republication of a will, and the whole is to be construed together as if the will had been executed at the date of the codicil."

It will be perceived that in case of the republica-

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tion of a revoked will in virtue of a codicil, the two are to be construed together, as if the will had been executed at the date of the codicil, and where the preceding instrument has never been completed, it and the codicil, which has the effect to give it validity that it never before had, must be taken together and make but one will, not merely for the purpose of construction but as to their execution; and it seems to us such must be the logical and necessary result of imparting to the codicil the legal effect of making valid as a will an instrument having no efficacy without.

But section 5, chapter 113, General Statutes, provides that "no will shall be valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence, or by his direction, and, moreover, *if not wholly written by the testator*, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the witnesses."

The object of the statute providing the manner in which a will shall be executed to render it valid is to insure identity and prevent imposition and fraud. And though a substantial compliance with it is all that is required, no court is authorized to admit to probate an instrument as the last will of a deceased person in violation of its express language, however well founded may be the belief it was intended by him as his will.

Taking the codicil and preceding unfinished in-

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strument together as but one will, as it seems to us we are bound to do, it was not executed in either of the modes required by the statute, not having been wholly written by the testatrix, nor subscribed or acknowledged by her in the presence of attesting witnesses.

It is true a document may, for the purpose of identification of an object or person mentioned in a will, or to elucidate and explain the intention of a testator, be referred to and made part thereof; but we are unable to perceive how any instrument, testamentary in its character, but not fully and properly executed as a will, can be made efficacious as such under our statute by mere reference in a codicil not itself subscribed or acknowledged before attesting witnesses.

We are, therefore, constrained to decide that the two instruments before us were not executed in compliance with the statute, and can not, without violating it, be admitted to probate as the will of Evelina J. Sharp.

Judgment affirmed.

CASE 82—PETITION ORDINARY—FEBRUARY 6.

Alexander v. Lou. & Nash. R. R. Co.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. A CONDUCTOR ON A RAILROAD TRAIN CAN NOT RECOVER against the company for an injury resulting from his own confessed want of experience and skill. The fact that the company employed him

88	589
107	233
83	589
1134	465

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with knowledge of his want of experience will not enable him to recover, although it would preclude the company from recovering against him for an injury to itself resulting from his want of experience.

2. IT IS THE DUTY OF THE CONDUCTOR OF A RAILROAD TRAIN, before moving his train, to know that each car is in proper running condition, and if he fails to make an inspection, and is injured by reason of a defect that might have been discovered by the exercise of ordinary diligence, he can not recover.

In this case the printed rules of the company required each conductor, before moving a train, to inform himself of the condition of the cars composing it. The conductor failed to do so, and was injured by reason of defective brakes. *Held*—That he can not recover.

3. IGNORANCE OF COMPANY'S RULES.—The fact that the conductor was not furnished with a copy of the printed rules of the company, and was ignorant of their existence, did not constitute a sufficient reason for rejecting them as evidence. It was his duty to acquaint himself with those rules, which he might have done by the use of ordinary diligence.
4. THE VIOLATION BY A CONDUCTOR OF A RULE OF THE COMPANY forbidding a "running switch" does not preclude him from recovering against the company for an injury received in making such a switch, it appearing that this was the only practicable way of putting cars on the particular switch, and that it had been so habitually resorted to as to raise the presumption that the company was aware of and approved it.

EMMET FIELD FOR APPELLANT.

1. If in an action by an employee of a railroad company to recover for injuries sustained in the course of his employment, the company admits negligence, but relies upon the negligence of plaintiff as a defense, there can be no judgment rendered for the defendant unless the jury find the plaintiff guilty of the contributory negligence alleged. If such alleged contributory negligence consisted in a disobedience of the company's rules, a printed copy of the rules can not be admitted in evidence when it is proved that the plaintiff was ignorant of the existence of the rules. (Wood on Master and Servant, 187.)
2. The question for the jury is not an abstract question of negligence in general, but whether, in each case, the plaintiff was guilty of the contributory negligence alleged
3. An employer engaging the services of a person known to be inexperienced, can not demand of him the skill exercised by one accustomed to such employment, but only the prudent exercise of such

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skill as he himself possesses. (Southern Wheel and Handle Co. v. Moorman, 6 Ky. Law Rep., 866; Wood on Master and Servant, 801.)

4. It is the duty of the company to notify inexperienced employees of the dangers incident to the employment. (Wood on Master and Servant, 714; R. R. Co. v. Fort, 17 Wal., 554; Coomes v. Cordage Co., 100 Mass., 28; Parkhurst v. Johnson, 50 Mich., 70.)

ISAAC CALDWELL AND WILLIAM LINDSAY FOR APPELLER.

1. It was necessary for plaintiff to show that the company knew, or ought to have known, the insufficient condition of its machinery; and if it was plaintiff's duty also to have this knowledge, he can not recover for injuries resulting from such defect in the machinery. (Thompson on Negligence, vol. 2, page 1009; *Ibid.*, page 992.)
2. If an employee knows, or, by the exercise of ordinary diligence, could know of the existence of defects in machinery or apparatus, the employer will not be liable for any injury resulting from such defects, unless it be shown that he had actual knowledge of them, and failed to notify the employee of their existence. (Sullivan v. Bridge Co., 9 Bush, 88, 89; Quaid v. Cornwall Bros., 13 Bush, 604.)
3. It was appellant's duty to know the condition of his train, and he can not recover for injuries resulting from defects, the existence of which he should have known.
4. Appellant was bound to take notice of the rules of the company, and a printed copy of them was competent evidence.
5. It was incumbent on appellant to show that he was free from neglect, and the failure of the jury to find contributory negligence was no ground for refusing defendant a judgment.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The injury for which appellant seeks to recover in this action was received by him while engaged in the service of appellee as conductor of a mixed train of cars, running on a narrow-gauge railroad, extending from the city of Louisville, about twelve miles in length.

At the time of the injury he was endeavoring to detach from the train and put upon a spur switch, about three miles from that city, called Callahan's switch, four empty flat-cars, which, by reason of the main track being up grade at that place, had to

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be done either by the use of a rope or by what is called a running switch, that is, cutting the cars off from the locomotive while in motion, and letting them, by the impetus given, run upon the switch track, the necessary change of rails at the intersection being made after the locomotive passes, the speed of which is accelerated upon being cut loose.

But the four cars being, on that occasion, without brakes, or such as could be used, appellant found it impossible to stop or check them on the down grade of the switch track, and to avoid a dangerous collision with another car standing thereon, loaded with stone, he jumped off one of the flat-cars, falling against rocks near the track, and in some way getting one of his legs run over by a car wheel, whereby he was severely and permanently injured.

The ground upon which he bases his right to recover, as set out in the petition, is the alleged negligence of appellee in providing him with cars having defective brakes that would not work when he attempted to stop the four cars on the switch, whereby the injury complained of was caused, of which defects appellee knew or might have known, by the use of ordinary diligence, and of which appellant did not know.

Appellee admits in its answer that the brakes on the four cars were negligently out of order, and did not serve the purpose for which brakes are intended, and that by reason thereof appellant was injured; but says he was at the time its chief officer and agent and the sole conductor of the train, and had

control and supervision of all the employees engaged in the running operations of the road, and of the rolling stock used on the road, and that the defects mentioned were known, or by reasonable diligence on his part might have been known, to him.

It is also stated in the answer, and attempted to be proved, that amongst appellee's printed rules for operating trains, which its conductors are required to obey, is one forbidding the placing of cars on switch tracks, by the method called a running switch, the one used when appellant was injured, which is always attended with danger. But conceding appellant knew, or that it was his duty to know, such rule existed, still we do not think his violation of it is a sufficient defense to this action. For the evidence tends to show that it is the most, if not the only practicable way to put cars on Callahan's switch, and had been so habitually resorted to, before appellant was employed as conductor, as to raise the presumption appellee was aware of and approved it.

It is alleged by appellant that he had never acted or had any experience as conductor of a railroad train before being employed as conductor on the narrow-gauge road, and that fact appellee knew at the time.

The evidence shows that appellant had for about three years been connected with the running of trains on other roads owned by appellee, as baggage-master and express agent, but was conductor about one month only before receiving the injury.

It further appears that appellee's superintendent

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of transportation, who had authority to select and employ conductors, was, when he put appellant in the position, aware of his lack of experience as conductor, but failed to furnish him with the printed rules of the company, and gave him no definite instruction as to his duties, the only instruction received by him being obtained from his predecessor, with whom he operated the train two days before taking full control as conductor.

In every contract of hiring between a railroad company and its employee, there arises a legal implication of good faith on the part of both to the public as well as to each other. Consequently, in an action by a passenger or stranger, or even by a subordinate employee, for an injury received on or by a railroad train by reason of the inexperience or want of skill of the conductor in charge of it, the liability of both the company and conductor is fixed, for in such case bad faith as well as negligence may be imputed to each of them. But in an action by a railroad company against a conductor of one of its trains for an injury resulting from his inexperience and want of skill, it would be a sufficient defense that the company employed him with full knowledge of his want of the necessary qualification for the position; for railroad companies are under the highest moral as well as a legal obligation to exercise care and diligence in the selection and employment of competent and trustworthy conductors of their trains, and none others, and hence a claim for damages in such case would be founded upon the plaintiff's own bad faith and negligence of the most reprehensible character.



And it seems to us that for the same reason the rule ought to be applied to an employee who voluntarily assumes the responsible position of conductor of a railroad train, and that he should be precluded from recovering against the company for an injury resulting from his own confessed want of experience and skill. For when he accepts the position he undertakes that he has the requisite qualifications to discharge, and will faithfully and diligently discharge, the duties of conductor. And upon the faith of such undertaking he is employed, and lives and property are intrusted to his custody.

It is true in this case the company knew appellant had no previous actual experience as conductor, and, as we have said, for that reason could have had no claim against him for an injury to it resulting from his want of experience; but that fact does not release him from his own undertaking, nor absolve him from the duty and good faith he owed to the public; nor does his want of practical experience as a conductor necessarily involve his ignorance of the hazards and responsibilities of the position at the time of his employment, for he had then been running on railroad trains for three years; and much less could such excuse avail him at the time he was injured, for he had then been actually in the service as conductor one month.

As, therefore, it does not appear that appellant was constrained by fraud or coercion on the part of the company to act as conductor, but being *sui juris*, did so voluntarily and for his own advantage, we think he should in this case be held to the per-

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formance of all the duties and responsibilities, and accorded only those rights and immunities that usually appertain to the position. Consequently, the following instruction contains the law applicable to this case, and was properly given:

"When a person assumes to act as a railroad conductor, * * * the law requires of him, in the discharge of the duties incident to that position, all the care, skill * * * and caution which ordinarily careful, skillful * * * and cautious persons engaged in similar business * * * observe."

The remaining inquiry, then, is, whether it was the duty of appellant, as conductor, before moving his train from the depot in the city of Louisville, to ascertain, or to exercise reasonable diligence in endeavoring to ascertain, whether the four flat-cars were supplied with brakes in proper condition, for the injury to him was entirely the result of the want of brakes on these cars that would work.

The evidence, as well as the special verdicts of the jury, show that appellant did not know, until he attempted to use them on Callahan's switch, that the brakes on the four cars were not in working order, and that he made no examination or test to ascertain whether they were fit for use, though he could have made such examination before using the cars.

It is the duty of railroad companies to furnish a safe road, and sufficient and safe machinery and cars. They can provide all this by the use of the requisite care and oversight, and if they fail to do it they are guilty of a breach of duty, and are

liable for the consequences, as well to their servants as to others. (Thompson on Negligence, vol. 2, 985, and authorities cited.)

And it is true that if a servant is injured by reason of latent defects or hazards incident to the occupation of which the master knows or ought to have known, but of which the servant does not know, nor can be reasonably required or expected to know, he may recover for such injury; for, as said by this court in *Sullivan v. Louisville Bridge Company*, 9 Bush, 81, "there are cases where the employee has a right to depend upon the judgment of his employer as to the safety of the material furnished him, and in such instances, when he is injured by the negligence of the party furnishing the material, his right to recover is unquestioned." But said the court in the same case: "In an examination of authorities on this subject, we have found no case where the employer, either from his own neglect or that of his agent, was held liable when the party using the material furnished him, and receiving an injury therefrom, knew before the injury was received as much about the material used and its defectiveness as the party furnishing it."

It appears that the company has a car inspector employed, whose business and duty it is to examine all cars, and if any one be found unfit for use, to indicate the fact by a mark thereon. It may be that if the car inspector had faithfully discharged his duty in this instance, which the evidence shows he failed to do, the four cars with the defective brakes would not have been put in use by appel-

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lant, and he would not have been injured. But the printed rules of the company require each conductor, before moving a train, to inform himself of the condition of the cars composing it, and, independent of the rules, he is neither required nor justified in using a car that is defective and unfit for use. That appellant was not furnished with a copy of the printed rules, and was ignorant of their existence, did not constitute sufficient reason for rejecting them as evidence in this case, and they were properly admitted; for it was his duty to acquaint himself with those rules, which manifestly he might have done by the use of ordinary diligence.

Moreover, the evidence shows that it is the duty of conductors and their custom, before moving trains, to know that each car is in proper running condition.

In our opinion it is properly, in fact necessarily within the scope of his duties, for a railroad conductor to ascertain, by all reasonable means in his power, before moving a train, that it may be done with reasonable safety of the lives of passengers, employees and property placed under his control, and every one should be held to the knowledge, experience and skill requisite to ascertain such fact.

The essential fact that appellant was injured by reason of his own negligence in moving the train when the four cars were not properly supplied with brakes, which by reasonable diligence and care he might have known, clearly appears, and, therefore, the court did not err in rendering judgment for the defendant, notwithstanding the jury failed to agree as to some of the interrogatories propounded.

The judgment is affirmed.

CASE 83—PETITION EQUITY—FEBRUARY 6.

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Labatt, &c., v. Smith, &c.

APPEAL FROM BATH COURT OF COMMON PLEAS.

1. **LIMITATION—LEX FORI.**—When a cause of action, which has arisen in another State between a resident of such State and a resident of this State, is sought to be enforced in the courts of this State, the Kentucky statute of limitations applies. Section 19 of article 4, chapter 71, Gen. Stat., has no reference to residents of this State, but was enacted only for the relief of those who are not residents, but who, having come within the jurisdiction of our State courts, are sought to be made liable by residents of some other State or country on a cause of action originating in another jurisdiction than that of the State of Kentucky.
2. **OVERRULED CASE.**—The case of *Allen v. Hill's Adm'r*, 78 Ky., 119, is overruled, in so far as it is in conflict with this.

REID & YOUNG, WM. LINDSAY AND W. R. PATTERSON FOR APPELLANTS.

Briefs not in record.

HENRY L. STONE FOR APPELLEES.

Brief not in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

In this case the judgment of the court below has been affirmed by the Superior Court, and an appeal prosecuted to this court. Lewis and Silas Lane, who were residents of the county of Montgomery, in this State, in the spring of 1870, had taken for sale, to the New Orleans market, a large lot of mules, and while in that city, attachments, issued in behalf of creditors, were levied on the mules, with a view of enforcing the payment of their several claims.

The appellees, Smith & Whitney, who were also residents of Montgomery county, had sold to the Lanes a lot of mules for six thousand six hundred

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and fifty dollars, for which they held their notes. Whitney, in March, 1870, went to New Orleans for the purpose of having the indebtedness secured, and instituted proceedings for that purpose. The mules were sold, and while the proceeds were in the hands of the collecting officer, and before any distribution had been ordered, or the rights of the creditors determined, Whitney sold to the appellants, who were his attorneys, the claim of Smith & Whitney for three thousand dollars—one thousand in cash, and their note for two thousand dollars, payable in sixty days from the third of March, 1870. After this transaction the Lanes were forced into bankruptcy by their Kentucky creditors, and one Richart made the assignee. In September, 1876, the present appellees instituted an action in the Bath Circuit Court on the note due by appellants, and garnished in the hands of Richart, the assignee, the amount of the dividends the appellants were entitled to by reason of their purchase of the note of six thousand six hundred and fifty dollars on the Lanes. Appellants were proceeded against as non-residents, and a judgment rendered by which the dividends, one thousand three hundred and thirty-one dollars, were applied to the payment of the note held on the appellants. The appellants, after this judgment had been rendered, moved to set it aside, tendering an answer that presented a defense to the action. The motion prevailed, and an issue was raised as to the right of recovery by appellees on the note.

The substance of the defense was, that the note was procured by the fraud of Whitney, and for

that reason it was asked to be canceled, and that appellees be compelled to restore the one thousand dollars paid at the time the note was executed. On the hearing, appellees recovered a judgment, subject to the credit for the amount collected or ordered to be paid by the assignee in bankruptcy.

There are several assignments of error. The first is, that the contract was invalid by reason of the Louisiana statute prohibiting such contracts between the client and attorney. Such a question can not arise for the reason that we find neither plea nor proof to support it. Second, that the note was procured by fraud.

It is sufficient to say, that the facts presented by the record conduce to show that appellants purchased with their eyes open. They must have known that the Lanes were in failing circumstances; creditors had then seized upon their property, and they were purchasing the note at less than half the sum stipulated to be paid by the Lanes, and without even requiring that the appellees should by their indorsement make themselves liable as ordinary assignees.

Appellants, in addition, executed a receipt to the appellees reciting the sale of the claim, and that all costs were to be paid by them, and that appellees were not to pay them or to be in any way responsible therefor.

During the progress of the action, and after the original answers had been filed, the appellants tendered an amended answer, in which is pleaded the Louisiana statute of limitation of five years as a further defense to the action, and this is the principal question involved on this appeal.

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The statute of Louisiana bars the recovery on such a note after the expiration of five years from its maturity, and makes the statute by an express provision apply to persons residing out of the State.

It is attempted to be maintained that the *lex loci* has controlled this class of cases since the adoption of the Revised Statutes.

The general rule "that all suits must be brought within the period prescribed by the local law," is conceded, but it is urged that by reason of the statute the doctrine of the common law has been changed, and that now, if the cause of action is barred by reason of the statute where the contract was entered into, or the note executed, it may be interposed as a bar to the recovery.

The statute of this State provides, that "when a cause of action has arisen in another State or country, between residents of such State or country, *or between them and residents of another State or country*, and by the laws of the State or country where the cause of action accrued an action can not be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this State." (General Statutes, chapter 71, article 4, section 19.) .

If the view taken by counsel for appellants is to prevail, it necessarily follows that the *lex fori* no longer governs this character of remedy, and the law of the place where the contract was made, or the cause of action accrued, must be looked to as fixing the statutory bar. This statute has no reference whatever to residents of this State, but was

enacted only for the relief of those who are not residents, but when coming within the jurisdiction of our State courts are sought to be made liable by residents of some other State or country on a cause of action originating in another jurisdiction than that of the State of Kentucky.

A resident of the State of Louisiana executes his note in that State, payable to a resident of the State of Tennessee, and when the parties are temporarily in Kentucky the obligor is sought to be made liable, the limitation in such a case is controlled by the law of the place where the cause of action accrued, and when not payable at a particular place, the presumption is that it is to be paid where it was executed.

This action is brought by residents of this State in the courts of this State against a citizen of Louisiana, who voluntarily appears and makes defense to the action; and it is now insisted that the purpose of the statute was to confer greater rights or exemptions in favor of a citizen of another State than is given to citizens of this State. The appellants had fifteen years within which to prosecute their action on the note executed by the Lanes and purchased of the appellees, and the latter have only five years in which to prosecute appellants on the note given in consideration of those notes; and, to follow appellants' construction of the statute still further, if a citizen of Kentucky executes his note in New Orleans to a resident of that city, the Louisiana statute may be pleaded in Kentucky; but if, while in New Orleans, the same transaction is be-

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tween two citizens of this State, the Kentucky statute of fifteen years applies. Such could not have been the legislative intent, and whether the appearance of the non-resident to the action was or not voluntary is immaterial, as the resident of this State is not affected by this statutory provision. The framers of the statute provided, first, *that where a cause of action has arisen in another State or country between residents of such State or country*, then the law of the State or country where the cause of action accrued will control the question as to the period in which a recovery may be had. They saw that this part of the statute applied alone to residents of the same State or country, and the question suggested itself that the same rule should apply where one of the contracting parties was a resident of one State or country, and the other of a different State or country, and, therefore, it was further provided, "*or between them and residents of another State or country*," not between them and the resident of Kentucky; for the law-maker was legislating alone for those who were non-residents of the State, and framed the statute so as that one could have no advantage of the other. In other words, that where parties who are non-residents make contracts within another jurisdiction, as between such parties, when they apply to the judicial tribunals of this State for the enforcement of their contracts or the collection of their debts, the statutory bar of the place where the cause of action accrued may be pleaded.

The case of *Bennett v. Devlin*, reported in 17 B.

Monroe, 353, does not sustain the position assumed by counsel. In that case the surety relied on the statute of New York, and the court responded by saying that the law, as well settled and in force prior to the adoption of the Revised Statutes, made the law of the place where the remedy was sought control the question of limitation; and the allusion to the Revised Statutes was made simply to show that some change had been made in the application of the rule.

In *McArthur v. Goodin*, reported in 12 Bush, 274, the extent to which the rule had been qualified was incidentally stated, and sustains the view taken of the question by the Superior Court.

This section of the statute must be held to apply when parties, resident out of the State, come into it in order to enforce their claims. This was the legislative purpose, and any other interpretation of its provisions is not even warranted by the language used, and certainly can not be indulged when the object to be accomplished is considered. These special provisions were intended solely for the benefit of those who in justice were entitled to have their rights disposed of, with reference to the time in which they should bring their action, by the law in force where the cause of action accrued, and where they had the right to expect the remedy would be sought. The construction contended for by counsel would enable the appellants to sue the Lanes on the note assigned them by the appellees at any time within fifteen years, while the note executed to the appellees by the appellants for the Lane note would be barred in five years.

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In the case of Allen v. Hill's Adm'r, reported in 78 Kentucky, 119, the Texas statute of limitation was alone considered, and our statute of limitation ignored, with the suggestion only that it provided the Texas statute should govern in the case then before the court, and in so far as it conflicts with this opinion must be disregarded.

If the statute is unconstitutional, because in violation of article 4 of the Federal Constitution, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," then it follows that the *lex fori* must govern, and the statute of this State where the remedy is sought must prevail. We are not to be understood as holding that the act is unconstitutional, as it is not required in this case that such a question should be determined.

The judgment below, in our opinion, must be affirmed.

CASE 84—PETITION ORDINARY—FEBRUARY 11.

Laidley, &c., v. Cummings.

APPEAL FROM KENTON CIRCUIT COURT.

1. IN PLEADING A DISCHARGE IN BANKRUPTCY, it is not necessary to allege that the court granting the discharge had jurisdiction, or to state the facts conferring jurisdiction, but it is necessary to allege, in substance, that the discharge was "duly granted."

The certificate of discharge need not be set forth in the answer in hæc verba, it being sufficient to refer to it, file it and make it part of the answer.

2. A DISCHARGE IN BANKRUPTCY CAN NOT BE ADJUDGED NULL AND VOID by a State court, in a collateral proceeding, for want of jurisdiction in the bankrupt court to grant it.

8. JUDICIAL NOTICE is taken by the State courts of the laws of Congress.

W. H. MACKOY FOR APPELLANTS.

1. An answer, pleading and relying upon a discharge in bankruptcy, must show jurisdiction in the court granting the discharge. (*Gebhard v. Garnier*, 12 Bush, 321; *McElmoyle v. Cohen*, 13 Peters, 312; *Barron v. Mayor of Baltimore*, 7 Peters, 243; *Twitchell v. Commonwealth*, 7 Wallace, 321; *Carpenter v. Snelling*, 97 Mass., 452; *Green v. Holway*, 101 Mass., 49; *People v. Gates*, 43 N. Y., 40; *Moore v. Quirk*, 105 Mass., 49; *Hunter v. Cobb*, 1 Bush, 239; *Hills v. Mitson*, 8 Exchequer, 750; *Sackett v. Andross*, 5 Hill, 327; *Stephens v. Ely*, 6 Hill, 607; *Maples v. Burnside*, 1 Denio, 332; *Varnum v. Wheeler*, 1 Denio, 331; *Morse v. Presley*, 5 Foster, 299; *McCormick v. Pickering*, 4 Comstock, 276; *Johnson v. Ball*, 15 New Hamp., 407; *Loring v. Kendall*, 67 Mass., 305; *Stoll v. Wilson*, 14 B. R., 571, and *s. c.*, 38 N. J., 198.)
2. Both foreign judgments and judgments of courts of sister States may be attacked in the courts of this State for want of jurisdiction. (*Wood v. Wood*, 78 Ky., 624; *Wickliffe v. Dorsey*, 1 Dana, 462; *Case v. Woolley*, 6 Dana, 20, 22; *Davis v. Connelly*, 4 B. Mon., 137; *Glass v. Sloop Betsey*, 3 Dallas, 1; *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Piersol*, 1 Peters, 340; *Hollingsworth v. Barbour*, 4 Peters, 466; *Wilcox v. Jackson*, 13 Peters, 498; *Shriver's Lessee v. Lynn*, 2 How., 43; *Lessee of Hickey v. Stewart*, 3 How., 750; *Shelton v. Tiffin*, 6 How., 163; *Williamson v. Berry*, 8 How., 495; *Boswell's Lessee v. Otis*, 9 How., 336; *Webster v. Reid*, 11 How., 437; *Thatcher v. Powell*, 6 Wheaton, 119; *Thompson v. Whitman*, 18 Wallace, 457; *Knowles v. Gas Light and Coke Co.*, 19 Wallace, 58; *Earle v. McVeigh*, 91 U. S., 714; *St. Clair v. Cox*, 106 U. S., 350; *Wise v. Watkins*, 3 Cranch, 331; *Perkins v. Proctor*, 2 Wilson, 382; *Regina v. Bolton*, 1 Q. B., 66 [E. C. L. R., vol. 41]; *Smith v. Shaw*, 12 Johnson, 257; *Suydam v. Keys*, 13 Johnson, 444; *McCord v. Fisher*, 13 B. M., 195; *Thumb v. Gresham*, 2 Met., 306; *Embry v. Miller*, 1 Mar., 303; *Drake's Adm'r v. Vaughn*, 6 J. J. Mar., 146; *Fletcher's Adm'r v. Wier*, 7 Dana, 347; *Holyoke v. Hawkins*, 5 Pick., 20; *Sears v. Terry*, 26 Conn., 273; *Borden v. Fitch*, 15 Johns., 141; *Manuel v. Manuel*, 13 Ohio St., 458; *Hoffman v. Hoffman*, 46 N. Y., 80; *Kerr v. Kerr*, 41 N. Y., 272; *Van Fossen v. The State*, 37 Ohio St., 317; *Commonwealth v. Blood*, 97 Mass., 533; *Perry v. St. Joseph, etc.*, R. R. Co. [Sup. Ct. Kansas], *Central Law Journal*, vol. 17, page 32; *Moore v. Tanner*, 5 Mon., 46; *Griffith v. Frazier*, 8 Cranch, 9; *Melia v. Simmons*, 45 Wis., 384; *Moore v. Smith*, 11 Richardson [Law So. Car.], 569; *Jochimsen v. Suffolk Savings Bank*, 3 Allen, 87; *Stiles v. Lay*, 9 Ala.,

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- 795; *Morse v. Presley*, 5 Foster [N. H.], 299; *In re Goodfellow*, 8 B. R., 452 [Lowell, J.]; *In re Penn*, 8 B. R., 582 [Butterfield, J.]; *Chemung Canal Bank v. Judson*, 8 N. Y., 254; *Wells v. Brackett*, 30 Maine, 61; *Pennywit et al. v. Foote et al.*, 27 Ohio St., 600; *Thompson v. Whitman*, 18 Wall., 457; *St. Clair v. Cox*, 106 U. S., 850; *Williamson v. Berry*, 8 Howard, 495, 540; *Wood v. Wood*, 78 Ky., 624; *Jones' Adm'r v. L. & N. R. R. Co.*, 10 Bush, 268.)
3. An answer pleading and relying upon a discharge in bankruptcy must allege that the discharge was duly granted. (Rev. Stat. U. S., section 5119; *Gibson v. People*, 5 How. [N. Y.], 543; *Butcher v. Stewart*, 11 M. & W., 875; *Nightingale v. Wilcoxson*, 10 B. & C., 216; *Rockwell's Receiver v. Merwin*, 45 N. Y., 166; *Pennoyer v. Neff*, 95 U. S., 714; *Michaels et al. v. Post, Assignee*, 21 Wall., 398; *Sloan v. Lewis*, 22 Wallace, 150; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S., 656.)

CLEARY, HAMILTON & CLEARY FOR APPELLEE.

1. A certificate of discharge in bankruptcy is conclusive evidence of the fact and regularity of such discharge when pleaded as prescribed by the bankrupt act, and can not be attacked in a collateral proceeding. (Rev. Stat. U. S., section 5120; *Pickett v. McGavock*, 14 Nat. Bankrupt Reg., page 236; *Corey v. Ripey*, 4 Nat. Bankrupt Reg., page 508; *Way v. Howe*, 108 Mass., 502; *Thurmond v. Andrews*, 10 Bush, 402.)
2. The jurisdiction of the court granting a discharge in bankruptcy can not be inquired into in a collateral proceeding. (Bump on Bankruptcy, 10th ed., page 8 [4 ed., page 30]; *Ib.*, 10th ed., pages 277, 899; *In re Walker*, 1 Nat. Bankrupt Reg., page 384; *In re Goodfellow*, 3 Nat. Bankrupt Reg., page 452; *In re Little*, 2 Nat. Bankrupt Reg., 294; Rev. Stat. U. S., section 5110.)
3. In pleading a discharge in bankruptcy, it is not necessary to allege that the discharge was duly granted, or to show the facts which conferred jurisdiction on the court granting it. It is sufficient to aver that on such a day it was granted, and file a copy. It is not necessary to set forth the discharge *in hæc verba*. (*Hays v. Ford*, 55 Ind., 52; *Miller v. Chandler*, Sup. Ct. La., 17 Nat. Bankrupt Reg., page 255; *Stoll v. Wilson*, 14 Nat. Bankrupt Reg., page 571.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellants on a promissory note given January 26, 1875. In his answer to the petition appellee says that June 9, 1875, he filed his

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petition in bankruptcy in the District Court of the United States for the Eastern District of Missouri, and such proceedings were had in relation thereto in said court as resulted in him receiving a full, final and complete discharge from all debts and claims which, by the act of Congress establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and an act amendatory thereof, were provable against him on June 9, 1875. The certificate of such discharge, duly authenticated, was filed with and made part of the answer, and pleaded as a complete bar to the action.

The demurrer to the answer having been overruled, appellant filed a reply, in which, after denying appellee had received the discharge, as alleged in the answer, he states that at the time of filing the petition in bankruptcy mentioned, appellee had not, for six months next preceding, nor for any portion of the six months, resided or carried on business in said judicial district; but, on the contrary, at the time of filing said petition, and for more than six months prior thereto, was a resident of the State of Kentucky, and engaged in carrying on business in the State of Ohio, and for that reason the District Court of the United States for the Eastern District of Missouri had no jurisdiction to grant to appellee a discharge in bankruptcy, and the proceedings had in relation thereto, relied on by him as a defense to the action, are null and void.

To the reply the lower court sustained a demurrer, and no amendment thereto being offered, the petition was dismissed.

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The first question we will consider arises on the demurrer to the answer, and is whether the defense relied on is properly pleaded.

Section 5119, Revised Statutes of United States, is as follows:

“A discharge in bankruptcy *duly* granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all his debts, claims, liabilities and demands, which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all writs brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge.”

Counsel for appellant contends that the answer is defective in failing to allege any facts which show or tend to show that the court granting the discharge had jurisdiction either of the subject-matter or the person of appellee.

The section thus quoted in terms provides that the discharge may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, and that the certificate shall be conclusive evidence in his favor.

As the manner in which a discharge in bankruptcy may be pleaded, and the effect to be given to the certificate are specifically mentioned in that section, it would seem it was not intended that in order

to make the answer good there should be an averment, either that the court granting the discharge had jurisdiction, or a statement of facts which confer jurisdiction. And even if the sufficiency of the answer in that respect is to be tested by the rules of practice and pleading in this State, the omission would not render it fatally defective.

Section 122, Civil Code, provides, that "in pleading a judgment or determination of a court or officer it is not necessary to state the facts conferring jurisdiction, but it shall be sufficient to state that the judgment or determination was duly given or made." And section 119 provides, that "neither presumptions of law nor matters of which judicial notice is taken, need be stated in the pleading."

It is true that this court has heretofore held in *Gebhard v. Garnier*, 12 Bush, 321, that neither of the sections of the Code quoted apply to judgments rendered in courts of other States, because the courts of this State can not take judicial notice of the statutes of other States conferring the jurisdiction of courts therein. But the reason does not apply to United States courts, the jurisdiction of which is regulated by laws of Congress, of which all State courts do take judicial notice.

But the discharge which it is provided by section 519 may be pleaded by the simple averment mentioned, is one which has been, in the language of that section, "duly granted," and section 122, Civil Code, requires a statement that the judgment pleaded and relied on was "duly given or made." Therefore, although it was not in this case necessary to state

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that the bankrupt court had jurisdiction, and the certificate being properly authenticated, is conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge, still we are inclined to the opinion that in compliance with the section of the bankrupt law quoted, and of our Civil Code, the answer should have contained an averment in substance that the discharge was duly granted, and the demurrer to it ought on account of such omission to have been sustained. But as the provision in the original act requiring the certificate of discharge to be set forth in the answer in *hæc verba* has been omitted from the law as it now stands, we think it was sufficient to refer to file and make it part of the answer, as has been done in this case.

The other and main question arises on the demurrer to the reply, and its determination depends wholly upon the construction of the bankrupt law, by which State courts must be governed.

Section 5114 is as follows: "If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain his discharge from his debts, and shall annex

to his petition a schedule and inventory and valuation, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt."

It will be perceived that in the section the conditions upon which a district court of the United States shall adjudge a petitioner a bankrupt are enumerated in detail, and amongst others is the requirement in respect to his residence and place of business. And it seems to us that under that section it is made indispensable, in order to give jurisdiction in such a case, that the petitioner should state that he had resided or carried on business for six months next before filing the petition in the judicial district, or for the longest period during such six months when such petition is filed. And that such is the interpretation of the section by the Justices of the Supreme Court is made manifest by the form for petitions in such cases which they were required by the law to prepare. For according to that form of petition he is required to state affirmatively he has resided and done business in the district for the length of time prescribed.

Therefore, as the bankrupt law required the jurisdictional facts of residence and place of business to be stated in the petition and sworn to, as a prerequisite to the adjudication by the court, we must presume that, before the court granted the discharge to appellee, the necessary averments were made by him in the petition and passed on by the court. And when that has been done, it is clear that a State court has no authority in a collateral proceed-

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ing to call in question the jurisdiction of the district court of the United States, and adjudge a discharge in bankruptcy granted by such court null and void.

Section 5110 provides that no discharge shall be granted, or, if granted, shall be valid, if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule or inventory, or upon any examination in the course of the proceeding in bankruptcy in relation to any material fact; and by section 5120 it is provided that any creditor who desires to contest the validity of a discharge upon the ground it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. Such application must be in writing, and specify which, in particular, of the several acts mentioned in section 5110 is intended to be proved against the bankrupt; and if, upon the hearing, the court finds that the fraudulent act is proved, and that the creditor had no knowledge of the same until after the granting of the discharge, the discharge shall be annulled.

In addition to the foregoing provisions, showing that the question of jurisdiction of the bankrupt court must be determined by that court before granting a final discharge, not only may any creditor, pending the proceedings, contest the jurisdiction, but the bankrupt, before a discharge is granted, is required by section 5113 to subscribe an oath that he has not done any thing specified as a ground for withholding the discharge.

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But even if it shall appear that the debtor did not have the requisite status to give jurisdiction, it will not avail a creditor after the discharge has been granted, if he had knowledge of the pendency of the proceedings.

It seems to us that it was intended to confer not only plenary but exclusive authority upon the court granting a discharge to annul it; and, as held by this court in *Thurmond v. Andrews*, 10 Bush, 400, a State court can neither annul nor disregard a discharge granted by a court of bankruptcy for any cause that would authorize such court to set it aside.

We therefore think the court properly sustained the demurrer to the reply, but for the reasons stated the answer was defective, and the court erred in overruling the demurrer to it.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion, either party having the right to amend his pleading.

CASE 85—PETITION EQUITY—FEBRUARY 23.

Hayden v. Robinson & Co.

APPEAL FROM HENRY CIRCUIT COURT.

1. WHILE THE HOMESTEAD RIGHT MAY BE WAIVED by a conveyance by husband and wife purporting to convey the whole estate, and which contains no limitation, either in the deed itself or in the certificate of the feme's acknowledgment, yet if it appears, either in the deed or the certificate, that the wife only released her dower, it will not be a waiver of the homestead.

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138	795

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2. A DEFENDANT ENTITLED TO A HOMESTEAD may by proper proceedings, even after a judicial sale in an action to which he was a party, have it or the proceeds, not exceeding one thousand dollars, set apart to him.
3. WHERE A DEBTOR WHO IS OCCUPYING TWO TRACTS OF LAND AS A HOMESTEAD EXECUTES A MORTGAGE UPON ONE of them and occupies as a homestead the other tract of greater value than one thousand dollars, upon which is situated the dwelling-house, he thereby elects to claim as his homestead the tract not mortgaged, and can not afterward claim a homestead in the mortgaged tract upon the ground that the mortgage contains a release by the wife of her dower only.
- In this case appellant occupied as a homestead two lots, upon both of which was a vendor's lien. He mortgaged one of them, retaining and occupying as a homestead the other tract upon which was situated the dwelling-house. In an action to enforce the liens the lot on which the dwelling-house was situated brought less than the amount necessary to pay the vendor's lien, and a part of the money derived from the sale of the mortgaged lot had to be applied for that purpose, leaving less than a thousand dollars with which to pay the mortgage debt. That amount the appellant asks to have set apart to him as the proceeds of his homestead.

Held—That he is not entitled to a homestead as against the mortgage. By mortgaging one lot and retaining the other he elected to claim as his homestead the lot not mortgaged, and must be held to that choice.

MASTERSON AND CARROLL FOR APPELLANT.

1. The deed declared on as a mortgage does not pass appellant's homestead. The words "Mrs. Hayden hereby conveys to the second party her dower in the property hereby conveyed," are words of limitation entitled to full meaning and effect (*Spurrier, &c., v. Parker, &c.*, 16 B. M., 280; *Churchill v. Reamer*, 8 Bush, 260), and can only be construed to mean that Mrs. Hayden conveyed her dower but not the homestead. (*Wing v. Hayden*, 10 Bush, 276; *Herbert v. Kenton B. & S. Association*, 11 Bush, 304.)
2. The homestead exemption not being waived in the manner pointed out by the statute, appellants are not divested of it by the judgment of the court or the confirmation of the sale. (*Wing v. Hayden*, 10 Bush, 276; *McGrath, &c., v. Berry*, 13 Bush, 391; *Crout v. Santer*, *Ibid.*, 442.)
3. Appellants not having conveyed their homestead, and not being divested of it by the judgment of the court, the facts stated in appellant's answer are sufficient to entitle him to a homestead as against appellee's claim, and the court erred in sustaining the demurrer. (*McTaggart v. Smith, &c.*, 14 Bush, 415; *Schmidt v. Oliges*, 6 Ky. Law Rep., 296.)

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CARROLL & BARBOUR FOR APPELLEES.

1. Where the wife unites with the husband in a conveyance of his land, and they by apt terms convey an absolute fee-simple title, the mere fact that the wife in a subsequent clause of the deed expressly conveys her right of dower will not prevent the homestead from passing. It is only where it appears that the wife united in the conveyance *solely* for the purpose of relinquishing dower that the homestead does not pass. (Vaugh v. Owsley, 8 Ky. Law Rep., 249; Robbins v. Cookendorfer, 10 Bush, 629; Sutton v. Puckett, 2 Ky. Law Rep., 319; Owens v. Spratt & Co., 1 Ky. Law Rep., 265; Gaddie v. Hodges, 5 Ky. Law Rep., 241; Herbert v. Kenton Building Asso., 11 Bush, 804; Wing v. Hayden, 10 Bush, 280; McGrath v. Berry, 13 Bush, 392; Moss v. Hall, 3 Ky. Law Rep., 89.)
2. A homestead exemption is not an estate in the wife; it is simply a right given by the law to a debtor to claim the home as exempt from his debts. (Brame v. Craig, 12 Bush, 404; Pribble v. Hall, 13 Bush, 66.)
3. After the judgment, sale, and confirmation of sale and the possession awarded, it is too late for appellant to set up his claim to a homestead in the land which was the subject of the action. (Harpending v. Wylie, &c., 13 Bush, 160; Boyer v. Lincoln, 3 Ky. Law Rep., 587; Queene v. Phillips, *Ibid.*, 470; Ireland v. Pugh, 4 Ky. Law Rep., 252.)
4. Appellant by selling or mortgaging the 22½ acre tract elected not to claim a homestead therein, and, therefore, can not assert such a claim merely because the tract which he did elect to claim as a homestead has been consumed in paying the vendor's lien. This is unlike the case of Bennett v. Baird, 5 Ky. Law Rep., 636. (Jarboe v. Colvin, 4 Bush, 70; Franks v. Lucas, 14 Bush, 396.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1877, W. B. Oldham, now deceased, sold and conveyed to appellant two tracts of land for one thousand four hundred dollars paid, and one thousand nine hundred and sixty dollars to be paid, one of them lying in and near to the town of New Castle, containing twenty-two and one-half acres, and the other having upon it a dwelling-house, lying wholly inside the limits of the town.

In 1882, appellant, for the recited consideration of nine hundred dollars, conveyed the tract of twenty-

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two and one-half acres to appellees, who afterwards brought this action to recover personal judgment on certain notes executed to them by appellant and another, and subject the tract of land to the satisfaction of their debts, it being alleged in the petition, and not controverted, that it was the agreement and understanding of the parties at the time it was executed that the deed of 1882 was to be considered and treated as a mortgage to secure the payment of the notes sued on.

The administratrix of Oldham being made a party, filed her answer, which was made a cross-petition against appellant, and at the April term, 1883, of the court personal judgment was rendered in her favor against appellant for the balance due of the purchase price of the two tracts of land, and in favor of appellees for their debts, then amounting to one thousand one hundred dollars, and at the same time the two tracts of land were directed to be sold, and the proceeds applied first to pay the purchase money due Oldham's estate, and the residue to appellees' debts.

At the sale, a report of which was made by the commissioner, and confirmed by the court at the October term, 1883, the lot on which was situated the dwelling-house brought the sum of one thousand eight hundred and ninety dollars, which was, however, less than the amount necessary to pay the Oldham debt, and a part of the money derived from the sale of the other lot had to be applied for that purpose, leaving six hundred and ten dollars only with which to pay the mortgage debt of appellees.

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At the same term an order was made awarding a writ of possession in favor of appellees, who purchased both lots at the judicial sale.

At the April term, 1884, appellant filed an answer and counter-claim, in which he stated that at the date of the mortgage to appellees in 1882, he was a *bona fide* housekeeper with a family, occupying the two lots as a homestead, the right to which he had not conveyed, or in any way released or waived, and prayed for an order requiring appellees to pay into court the sum of six hundred and ten dollars mentioned, to be reinvested in a homestead for his benefit, or to have set apart to him a homestead in the lot of twenty-two and one-half acres.

This is an appeal from the judgment sustaining a general demurrer to that answer and counter-claim.

It is well settled that a defendant entitled to a homestead may, by proper proceedings, even after a judicial sale in an action to which he was a party, have it or the proceeds, not exceeding in amount one thousand dollars, set apart to him. Appellant was consequently not precluded by the judgment and sale under it of the two lots from the recovery sought in his answer and counter-claim.

Appellant and his wife were both parties to, signed and acknowledged the deed made to appellees in 1882; but it contains the following clause: "The said Mary Hayden hereby conveys to said second party all her right to dower in the property conveyed."

It seems to us clear that the language quoted imports a limitation of the estate, or interest of the

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wife conveyed by the deed, and the effect of it generally is determined by the rule stated in *Wing v. Hayden*, 10 Bnsh, 276, since adhered to by this court, as follows:

"The homestead right may be waived by a conveyance by husband and wife purporting to convey the whole estate, and which contains no limitation, either in the deed itself or in the certificate of the *feme's* acknowledgment; but if it appears, either in the deed or the certificate, that she only released her dower, it will not be a waiver of the homestead."

But the question arises here, not before passed on by this court, whether a debtor who mortgages one of two tracts or lots of land owned by him, retaining and occupying as a homestead the other, which is of greater value than one thousand dollars, can thereafter in any case reassert a right to and legally hold the first as a homestead to the prejudice of the mortgagee and purchaser at a judicial sale, upon the ground that the mortgage, though effectual in every other respect, contains a release by the wife of her dower only.

By section 10, article 13, chapter 38, General Statutes, a right is given to a defendant, the owner of land occupied as a homestead exceeding in value one thousand dollars, before a sale under execution, order of attachment or judgment of court, to have set apart to him such part thereof not exceeding that amount in value as he may select, and, as has been held by this court, he is not confined to the part on which the dwelling-house is situated, but may select any other part of it.

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But by section 12 it is provided, that if in any such case the homestead exceeds in value the statutory limit, and is not susceptible of division without great diminution in value, it shall be sold, and the residue of the proceeds, after first paying that amount to the defendant with which to purchase another homestead, applied to payment of his creditors.

It will thus be perceived, that although it is the object of the law to exempt from coercive sale the homestead, yet the excess in value above the fixed amount is in every case made subject to the owner's debts, even when it becomes necessary to sell the whole in order to make the surplus available for that purpose.

But this is not a case contemplated or provided for in either of the two sections mentioned. On the contrary, appellant, before any sale of the property under execution, attachment or judgment of court, or the commencement of an action to obtain a sale, voluntarily mortgaged to appellees one of the tracts or lots described by a separate and distinct boundary, holding the title and possession of the other on which was situated the dwelling-house, that brought at the judicial sale one thousand eight hundred and ninety dollars, and which it is therefore fair to presume was, at the date of the mortgage, worth greatly more than one thousand dollars.

He was not at that time entitled to a homestead exemption in both lots, nor could he have claimed against a creditor more of either than was of the value fixed by law as the limit. But he had the

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right to sell and convey any part or all of either or both, and having elected to mortgage the twenty-two and one-half acres, and to retain, occupy, and claim as his homestead the other lot, neither the letter of the homestead law would be violated nor the object of it defeated by holding him to that ~~choice~~, especially when not to do so would unjustly prejudice the ~~intervening~~ rights of others. For being thus the owner and in ~~possession~~ of a homestead of the statutory value, he had and enjoyed ~~the~~ benefit of exemption to the full extent afforded by the homestead law, and the purpose of that law should be in this case regarded as to him satisfied. Nor can the limitation referred to in the mortgage relieve him; for only such homestead right as he had enured to his wife, and, consequently, her right, like his, was restricted to the lot which he elected to occupy and claim as his homestead, and her dower interest was all she had in the twenty-two and one-half acres, and that was relinquished.

It is true that there was an existing vendor's lien on both tracts at the time the mortgage was executed to appellees, and both were subsequently sold for the purpose of paying the purchase money; but it does not appear whether such sale was the result of the fault or misfortune of appellant, nor is it the subject of proper inquiry; for the homestead right of appellant, as well as the right acquired by appellees in virtue of the mortgage, was subordinate to the vendor's lien, and no fault can be imputed to them for the loss appellant permitted to fall on himself. On the contrary, the mortgage was

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given and accepted upon the implied undertaking by appellant that he would pay the purchase money and release the vendor's lien.

Judgment affirmed.

CASE 86—PETITION EQUITY—FEBRUARY 28.

Miller, &c., v. Craig.

88	629
102	47

APPEAL FROM MARION CIRCUIT COURT.

WHERE THERE HAS BEEN A MISTAKE AS TO THE QUANTITY OF LAND SOLD AT A JUDICIAL SALE, the Chancellor will in a subsequent action afford relief, if the mistake be such that relief would be granted if the sale had been a private one.

The appellee purchased at judicial sale a tract of land supposed to contain forty acres, when in fact it contained one hundred and twenty-eight acres. The land was sold to pay the debts of a decedent, and all the debts having been paid, appellants as heirs-at-law seek to recover the excess of eighty-eight acres, or to compel appellee to pay therefor at the rate of his bid.

Held—That appellants are entitled to recover, and the lower court should render judgment giving appellee the right to elect on which side of the tract he will have forty acres laid off, or to take the whole tract, paying for the excess at the rate of his bid.

ROUNTREE AND LISLE FOR APPELLANTS.

The record shows clearly a mistake of fact in that the parties supposed the tract of land sold contained but forty acres, whereas it in fact contained one hundred and twenty-eight acres. Equity should relieve against such a mistake. (*Hardeman v. Sanders*, 5 Ky. Law Rep., 860; *Coger's Ex'r v. McGee*, 2 Bibb., 323; *Buck v. Holloway's Heirs*, 2 J. J. M., 165; *Wiley v. Fitzpatrick*, 3 J. J. M., 584; *Whitney v. Whitney*, 5 Dana, 330; *Cosby's Heirs v. Wickliffe*, 12 B. M., 204; *Worley v. Tuggle*, 4 Bush, 168; *Mattingley v. Speak*, *Ibid.*, 316.)

FINLEY SHUCK FOR APPELLEE.

1. The land was sold for forty acres "more or less," and, therefore, appellee bought, and is entitled to hold all the land contained in the boundary sold.

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2. The plaintiffs in the suit in which the sale was made, to which the plaintiffs in this suit were parties, had the sale confirmed and the deed made, and accepted the money for the land before this suit was brought. That suit is off the docket, and the plaintiffs in this action are estopped by the proceedings in that suit from questioning appellee's title to the land therein conveyed. (*Dawson v. Litsey*, 10 Bush, 411; 1 Met., 284; *McGowan v. Pennebaker*, 3 Met., 502; *Carpenter v. Strother*, 16 B. M., 295.)
3. There is no evidence to show that there is more land in the tract described by the deed than forty acres.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellants brought this action to recover of appellee eighty-eight acres of land, an alleged surplus or excess of a tract purchased by appellee at a judicial sale, which was supposed to contain but forty acres, or to compel him to pay therefor at the rate of two dollars per acre, the price bid by him.

It seems that in an action to settle the estate of Jane P. Massengale, deceased, all her real estate was adjudged to be sold, and the balance of the proceeds, after payment of debts, paid over to appellants, who are her heirs-at-law.

The lands were, previous to the sale, which took place in 1878, surveyed and laid off into lots, and the lot purchased by appellee was reported by the surveyor to contain forty acres; but he did not survey the entire boundary for want of title papers, although it is described in the report as if surveyed.

The testimony of the witnesses who were present at the sale is somewhat conflicting as to whether the lot in question was bid for and purchased by appellee in gross or by the acre; but the commissioner who made the sale stated in his report that appellee became the purchaser of the forty-acre tract of knob

land at his bid, eighty dollars, for which he gave bond.

The report of the sale was subsequently confirmed, but the purchase money was not fully paid by appellee, nor the commissioner's deed made to him until 1881, however, before this action was commenced.

It seems that in 1879, after the confirmation of the sale, but before the deed was made, appellants caused the lot to be again surveyed, and offered to lay off to appellee forty acres thereof; but he refused to accept less than the entire boundary, as shown by the report of survey, made under order of court, and by the commissioner's deed.

Though the survey made at the instance of appellants is somewhat imperfect, and the evidence of the surveyor in this case does not make it entirely satisfactory that there is as much as one hundred and twenty-eight acres in the lot, which would make an excess of eighty-eight acres, we are convinced that appellant has gotten nearly three times as much land as the report of the surveyor showed there was in the tract, and as appellants were led to believe at the time of the sale there was.

In our opinion it does not make any difference whether the lot was sold by the acre or in gross. It is clear that it was sold under a mistake by appellants, as well as by the surveyor who reported to court, as to the quantity contained in the boundary, for it is preposterous to suppose that appellants would have knowingly consented to a sale of the lot as containing forty acres only, when it contained in fact nearly one hundred and twenty-eight.

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The mistake is so gross and palpable that the Chancellor would not hesitate to grant relief, if it had been a private sale; for, in the language of this court, the excess of land is beyond the range of ordinary contingency; in fact, relief has been granted where the excess has been very much less than appears in this case.

If grounds exist which would authorize the interposition of a court of equity in case of a private sale, we perceive no sufficient reason for withholding relief, because the mistake occurred and the unconscientious advantage was obtained by appellee at a judicial sale.

The case of *Dawson v. Goodwin*, 15 B. M., 439, was where Goodwin purchased at a decretal sale a tract of land estimated and sold as containing one hundred and sixty-seven acres, which was afterwards ascertained to contain one hundred and ninety-eight acres. The sale was made to satisfy liens which Goodwin and Dawson each held on the land; but the proceeds being sufficient to satisfy the one of the former, which was superior, the latter brought an action to subject the surplus to satisfy his debt, or the remainder of it not satisfied by the first sale. The land was purchased as a tract containing one hundred and sixty-seven acres, which the title papers showed to be the quantity, and was purchased in gross and not by the acre. Nevertheless, this court held the surplus of only twenty-nine acres subject, saying: "We are not able to perceive any good reason why a sale made as this was at public auction, by a commissioner of court under a decree, should

make a difference in the rights of the parties to indemnity for an innocent mistake in regard to quantity. If there be a surplus sufficiently large to call for the interposition of the Chancellor in a private sale, we think his aid should be equally extended to the injured party in case of a public sale made by his order."

And in the case of *Cosby v. Wickliffe*, 12 B. M., 202, it was held that the Chancellor had the right in another action to correct a mistake made in the report of a commissioner as to the quantity of the debtor's interest in land sold under a decree in a former action.

We do not think that it at all violates the rule adopted for securing certainty and stability in judicial sales of land, to afford relief in a subsequent action from fraud or mistake occurring in such sales. In fact, such sales derive their sanctity from their supposed fairness and regularity, and it is just as important and obligatory upon the Chancellor to afford relief against fraud or mistake committed in them, when wrong and injury has been done, as it is in case of private sales.

In this case it seems all the debts against the estate of the decedent have been paid, and appellants as heirs-at-law are entitled to the surplus of land.

The lower court ought to have rendered judgment giving to appellee the right to elect on which side of the tract he will have forty acres laid off, or to take the whole tract, paying at the rate of two dollars per acre for the excess, and with a view to

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ascertain the quantity of excess, an accurate survey should, if necessary, be made.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CASE 87—PETITIONS EQUITY—FEBRUARY 23.

Curran v. City of Louisville.

Dugan v. Same.

McDonough v. Same.

APPEALS FROM LOUISVILLE CHANCERY COURT.

1. **MERE NON-USER OF AN EASEMENT** which has been acquired by grant or its equivalent will not defeat the right to the use. To do so, there must be an adverse use by the servient estate for a period sufficient to create a prescriptive right.
2. **EMINENT DOMAIN—ABANDONMENT OF RIGHT ACQUIRED.**—To show an abandonment of the right acquired by the condemnation of property for a public use, the acts relied on must be of a conclusive character and clearly established by the evidence.

The property of appellants was condemned in 1867 in favor of appellee for the building of a city or canal basin, and a wharf in connection with it. Appellants brought this action in 1879 to recover the possession of the property, upon the ground that the right acquired by the city had been lost by non-use and abandonment. Three or four years prior to the bringing of these suits the city leased free of rent for ten years a small portion of the property, and the remainder has been used by the city as a "dumping ground." When these suits were brought negotiations were pending for a lease of the property for a term of years to a railroad transportation company.

Held—That the character and duration of the non-user create no presumption of abandonment. The reason for it is shown by the city's inability to hitherto construct the work, and it does not appear that the city has done any act, permanent in character, which is even likely to interfere with the future enjoyment of the use intended.

83	628
1123	238

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8. IN THE EXERCISE OF THE RIGHT OF EMINENT domain real estate may be taken for one public use, and thereafter, by legislative consent, be applied to another of a kindred kind without working a reversion to the original proprietor.

TEMPLE BODLEY AND F. W. MORANCY FOR APPELLANTS.

1. The charter of a municipal corporation must be strictly construed. Its terms can not be extended by intendment. It can confer no powers other than those expressly granted. The charter of Louisville of 1865 does not give the city the power to condemn private property for the purpose of making a canal basin. Hence the condemnation proceedings were void. (*Johnston v. Louisville*, 11 Bush, 538; *Cooley's Const. Lim.*, 580, 594; *Elliott's Charter and Ordinances of Louisville*, pages 146, 147; *Hays v. Briggs*, 74 Pa. St., 373; 55 Pa. St., 25.)
2. Under the condemnation proceedings the city took only an easement in the land condemned, the fee remaining in the original owners. (*Eggleston v. Haff*, 26 Ind., 38, 39; *Washington Co. v. Prospect Park R. R. Co.*, 68 N. Y., 591; *In re Amsterdam Water Commissioners*, 96 N. Y., 351; *West Cov. v. Freking*, 8 Bush, 123; 16 N. Y., 97; article 7, section 1, Charter of Louisville; section 10 of an act to amend the charter of Louisville, approved June 2, 1865; *Green's Brice's Ultra Vires*, page 100 and note; *Barclay v. Howell's Lessee*, 6 Pet., 498; *Jackson v. Rut. & Bur. R. R. Co.*, 25 Vt., 151; *Jackson v. Hathaway*, 15 Johns., 447; *Adams v. Rivers*, 11 Barb., 390; *Hooker v. T. P. Co.*, 12 Wend., 371; *People v. White*, 11 Barb., 26; *Heard v. City of Brooklyn*, 60 N. Y., 242; *Dean v. Sullivan R. R. Co.*, 22 N. H., 282; *Quimby v. Ver. C. R. R. Co.*, 23 Vt., 387; *Weston v. Foster*, 7 Met., 297; *Henry v. Dubuque & Cal. R. R. Co.*, 2 Iowa, 288; *Geisy v. R. R. Co.*, 4 Ohio St., 308; 41 Ind., 364.)
3. This easement was lost by non-user or abandonment. (123 Mass., 155; *American Law Reg. (N. S.)*, vol. 2, page 513; 2 Washb. Real Prop., page 370; *Parkins v. Denham*, 3 Strob. (S. C.), 224; *Steiner v. Tiffany*, 18 R. I., 568.)
4. An easement in land condemned and taken for public use, is lost by being diverted from its original purpose. (*Imlay v. Union Branch R. R. Co.*, 26 Conn., 255; 21 Mo., 582; 48 Mo., 363; 22 Iowa, 357; *Malone v. City of Toledo*, 28 Ohio St., 643; *Chase v. Sutton*, 4 Cush., 167.)

W. O. HARRIS FOR APPELLEE.

1. Mere non-user does not operate as a forfeiture of an easement. To produce this effect, there must be an adverse use by the servient estate for such a period as would create a prescriptive right. (*D. & N. R. R. v. Covington*, 2 Bush, 526; *Rowan v. Portland*, 8 B. Mon.,

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- 250; Boone Law of Real Prop., sec. 147; Arnold v. Stephens, 24 Pick., 106; Chandler v. Jamaica, 125 Mass., 544.)
2. In order to show an abandonment, acts must be shown of such a conclusive character as to indicate clearly an intention to abandon. (Dyer v. Sanford, 9 Metc., 395; Hayford v. Spokesfield, 100 Mass., 491.)
 3. A mere change of the purpose for which the easement was acquired, will not constitute an abandonment. (Boone Real Prop., sec. 147; Mendel v. Delano, 7 Metc., 176; Proprietors v. R. R. Co., 104 Mass., 1; Hatch v. R. R. Co., 18 Ohio St., 92; Malone v. Toledo, 28 Ohio St., 648; Chase v. Sutton, 4 Cush., 167.)
 4. Leasing premises subject to an easement does not operate as a forfeiture. If the city had no right to make the leases, they are void and of no effect. (Belcher v. St. Louis, 5 Arm. & Eng. Corporation Cases, 417; Illinois, &c., v. St. Louis, 2 Dillon, 82.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The lots of the appellants, Dugan, Curran, and McDonough, together with those of other owners in the city of Louisville, were, under a writ of *ad quod damnum* in favor of the city, duly condemned in 1867 for the building of a city or canal basin, and a wharf in connection with it, adjoining the Ohio river.

These actions were brought in 1879 by the appellants, who seek to recover the possession of their lots so condemned, and the assessed value of which they received from the city, upon the ground that the right or perpetual easement acquired by the city thereby has been lost by non-user and abandonment.

The city has been in possession of the lots ever since the condemnation; but, owing to its financial condition, has been unable to buy the additional adjoining land necessary for the designed purpose, and build what will be a costly public work. It has been proposed by its authorities to do so several

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times since the condemnation, but found to be impossible for the reason stated.

Three or four years prior to the bringing of these suits it leased, free of rent for ten years, a small portion of the property to a glass company for temporary purposes; and it has erected temporary frame buildings upon it.

The remainder of the property has been used by the city as a "dumping ground."

When these suits were brought negotiations were pending, but not concluded, between the city and a railroad transportation company for a lease of the property to it for a term of years.

The city had also given a transfer railroad company, by an ordinance fixing the terminal points, the right to cross its wharves and public ways between those points; and it is surmised and probable that it may cross this property at some point, as it will probably be the least expensive route. This, however, is a mere conjecture.

These facts, together with the failure of the city to take any step to devote the property to the use for which it was obtained, are relied upon by the appellants for a recovery of it.

The appellee holds the property by what is equivalent to an express grant without any limitation within which the right granted must be exercised.

It has had the exclusive control of it since the condemnation. No third party has acquired any interest, and no innocent person can be injured. There has been no adverse use, and conceding that the right of the city in the property is but a per-

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petual easement, yet there has been no interference with it by the servient estate.

The language of some cases seems to imply that the mere non-user of an easement, which has been acquired by prescription or adverse use, for a sufficient length of time, is of itself an abandonment; but more correctly, it is nothing more than evidence of an intention to abandon the right. In this case, however, the non-user for the designed purpose only extends over a period of twelve years.

Where, however, an easement has been acquired by grant or its equivalent, no length of mere non-user will defeat the right. To do so there must be an adverse use by the servient estate for a period sufficient to create a prescriptive right. (Washburne's Servitudes and Easements, page 640; Rowan v. Portland, 8 B. M., 250; Chandler v. Jamaica Pond Aqueduct, 125 Mass., 545.)

The right to the *use* in such a case is not extinguished by mere *disuse*. There must be something more than this. There must be some act upon the part of the owner of the land or the servient estate inconsistent with the existence of the easement or dominant estate.

The question next arises whether the acts of the city show an abandonment of the right it acquired by the condemnation. To have this effect they must be of a conclusive character, and clearly established by the evidence. They must show an *intention* to abandon the intended use.

It is well settled that in the exercise of the right of eminent domain real estate may be taken for one

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public use, and thereafter by legislative consent be applied to another of a kindred kind without working a reversion to the original proprietor. Thus a canal may be converted into a railroad, or a street used for the latter purpose; water-pipes may be laid along a street, sewers constructed, and it applied to many public uses for the public convenience and health without working a reversion to the former owner, or entitling him to additional compensation.

But this case does not require us to determine whether the city government of Louisville had the right to change the use of the property in contest from a canal basin to other public uses, or whether this would have been in law an abandonment; nor is it necessary to determine whether the abuse of a prescriptive right destroys it, because, in our opinion, the testimony in the record fails to show such acts upon the part of the appellee as would raise these questions. The appellee has constantly held possession, looking to the end originally contemplated. No acts upon its part are disclosed by the evidence which disable it from using the property in the future for the use for which it was condemned. Those of which the appellants complain manifest the city's intention to hold the possession against the appellants instead of showing an intention to abandon the right. It does not appear that it has done any act, permanent in character, which will, or is ever likely to, interfere with the future enjoyment of the use intended.

If it had attempted to convey in fee-simple the

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property or a part of it when it had but an easement, this would have clearly shown an intention to abandon its right, because it involved a cessation of all public uses.

Even a grant by it to the transfer company of the privilege to cross the intended wharf would not necessarily affect the right, because such a use would probably not interfere with the intended use by the city.

The character and duration of the non-user create no presumption of abandonment. The reason for it is shown by the city's financial inability to hitherto construct the work. Upon the contrary, it clearly appears that the appellee has had no purpose of permanently abandoning the intended use, and the judgment below is affirmed.

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Boaz's Adm'r v. Milliken, &c.

APPEAL FROM SIMPSON CIRCUIT COURT.

1. A GUARDIAN IS LIABLE for loss to the trust estate by the fraud or wrong of another which was made possible by his own gross neglect, although he may never have received the estate.
2. CASE ADJUDGED.—At the time of the appointment of a guardian there was pending a claim of his ward for a pension filed by a former guardian in the proper department at Washington. The newly appointed guardian allowed two years to pass after his appointment before taking any steps to secure this claim for his ward. In the meantime the former guardian had secured the certificate of the county court clerk of his county that he was still the guardian, and thereupon received the pension money his former ward was entitled to, the greater part of it having been received by him within ten months after the appointment of the new guardian.

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Held—That the second guardian was guilty of gross neglect in taking no step looking to the collection of the claim, and in not notifying the pension department of his appointment, thus allowing the claim to stand in the name of the former guardian, and exposing it to the hazard of collection by him; and he is, therefore, liable to the ward. Judge Pryor dissenting.

A. DUVALL FOR APPELLANT.

The ward's claims constituted *debts* against the Federal Government, and the failure to take steps to collect these claims was as much negligence as if they had been debts against an individual.

R. RODES ON SAME SIDE.

It was Milliken's duty to collect the claim of his ward at once, or to notify the Pension Department of his appointment. His failure to do so was gross negligence, for which he is liable. (*Hemphill v. Lewis*, 7 Bush, 214-15; 1 Perry on Trusts, sec. 440.)

G. W. WHITESIDES ON SAME SIDE.

Milliken was guilty of negligence in not notifying the Pension Department of his appointment as guardian, and his sureties must make good the loss resulting therefrom. (*Commonwealth v. Miller*, 5 Mon., 209; *Hemphill, &c., v. Lewis*, 7 Bush, 215.)

JNO. M. GALLOWAY FOR APPELLEES.

1. The fund due the ward which the guardian failed to collect was a mere bounty. Moreover, the guardian had no reason to anticipate that the former guardian would, with the aid of the county clerk, be enabled to perpetrate the wrong which he did. For these reasons he is not liable.
2. Where a fund has never come into the guardian's hands and is apparently safe, he is not bound to sue at once. (*Konigsmacher v. Kimmel*, 21 Am. Dec., 374.)
3. This case distinguished from *Cross v. Petree*, 10 B. M., 413, and *Hemphill, &c., v. Lewis*, 7 Bush, 214.

EDWARD W. HINES ON SAME SIDE.

1. The guardian could not possibly foresee what happened, and he is not liable for failing to guard against it. The Pension Department threw around the fund so many safeguards, there was no reason to suppose any additional precaution was necessary. (49 Am. Dec., 516, note.)
2. Chancery deals with tenderness toward a trustee acting in good faith. (*Keller's Appeal*, 8 Pa. St., 288.)
3. Milliken was not required to deal with the former guardian as a rogue. Such high vigilance is not required of this class of trus-

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tees. (Irwin's Appeal, 35 Pa. St., 397; Neff's Appeal, 57 Pa. St., 91; Konigmacher v. Kimmel, 1 P. & W., 207; s. c. 21 Am. Dec., 374.)

4. There is neither pleading nor proof showing that Milliken did not notify the Pension Department of his appointment.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

Simeon Boaz died a soldier in the Federal army, leaving an infant son. In November, 1873, David S. Bryan was appointed his guardian, and shortly thereafter he, as such guardian, by an attorney, prepared and filed, under the laws of the United States, in the proper department at Washington, two claims for his ward in right of the father, one being for back pay and bounty, and the other for a pension.

While they were yet pending, and before any thing had been allowed upon them, Bryan resigned, and was discharged as guardian.

On September 2, 1874, the appellee, G. H. Milliken, qualified as the guardian, and together with his surety, W. W. Milliken, covenanted in his bond that he "would faithfully discharge the trust." The infant had no estate whatever save these claims.

Upon March 4, 1875, Bryan collected and receipted to the government for one hundred and thirty-seven dollars and forty-six cents of bounty money; July 31, 1875, for one thousand two hundred and thirty-six dollars and seven cents of pension money, and on September 8, 1875, December 8, 1875, March 30, 1876, and June 22, 1876, thirty dollars at each date, or one thousand four hundred and ninety-three dollars and fifty-three cents in all. He obtained the money in each instance upon his affidavit and the certificate of the county court clerk that he was still the guardian.

On September 4, 1876, G. H. Milliken made oath to the proper paper to be filed by him as the substituted guardian in the proper department at Washington; and not until this time did he, so far as the record discloses, take any step whatever in the direction of securing the claim for his ward, or looking to its prosecution, or by way of notifying the department that he had become the guardian. In fact, it does not appear that he ever even made an inquiry of any character as to the claims, although there is evidence showing that he knew, when he qualified, of their existence, and that they were pending before the proper governmental department.

The conclusion is irresistible that he became guardian by reason of their existence, and to further their prosecution, because the ward had no other estate whatever.

The only question necessary to be considered upon this appeal, and it is one which is not free from difficulty, is whether the guardian, Milliken, was guilty of such gross neglect and inattention, after he voluntarily took upon himself the trust, as to render himself responsible for the loss of the money by the fraud of Bryan. No effort seems to have been made to collect the money from him by the appellee, Milliken, and he is doubtless irresponsible.

The government having paid the money over to the person who, upon the record upon file in its department, was entitled to receive it, would, beyond question, refuse to pay it again, so that if the hardship of the case could be considered by us, it would be in equipoise.

A guardian is a trustee, and all that a court of equity requires of him is ordinary prudence and skill. An executor or administrator must be diligent in the collection of a debt in order to prepare for distribution; but if the fund has never come to his hands, a guardian is not bound to sue at once, but may leave the debt where he finds it, unless the circumstances be such that they would apprise an ordinarily prudent man of danger of its loss by doing so. He is not an insurer, and is not liable for the fraud or wrong of another as to the trust estate, unless the danger is incurred by his own gross neglect. Indeed, Lord Hardwicke said:

"If there was no *mala fides*, nothing willful in the conduct of the trustee, the court will always favor him."

But while this is the case, yet if he is clearly shown to have been guilty of supine or gross negligence in the management of the trust estate, he should be charged with the loss occasioned thereby, although he may never have received it. His liability is not confined to cases of active, willful interference upon his part; but may arise from an omission of such a character that it can only be attributed to his gross neglect or a failure of a plain duty. He must act as others do with their own goods. His duty is not less than what an ordinarily prudent man would do for himself.

This at least should be required of him as to a trust which he has voluntarily assumed for one who is incapable of attending to it. If he has been either supinely negligent, or guilty of willful default, he must make good any loss arising therefrom.

It does not appear that the guardian in this instance is chargeable with willful wrong. It is conceded that he got none of the money. He, however, knew when he assumed the trust that the claims were pending against the government; he must be held to have known that they were in the name of Bryan, and if allowed, that they would be so audited and paid, unless the department was in some way notified of the change of guardianship. It was his duty to investigate and prosecute the claims; he knew of their existence; they constituted the entire estate, and it is both fair and safe to assume that had they not existed he would never have qualified. They were not a gratuity upon the part of the government, but a claim for services rendered to it, and for the payment of which it had provided by law.

If the claim proved to be a valid one, then it was a debt, or at least an obligation upon the government.

It may be said, however, that if this be so, then the guardian in his discretion had the right to let the money remain in the hands of the government. The correctness, however, of the claim was unascertained; it was the duty of the guardian to prosecute it to a settlement; and moreover, *he knew that it was in the name of one who was no longer entitled to receive it, and that this fact was not known to the government.* He knowingly permitted this state of case to continue for over two years, thus exposing the claim to the hazard of collection by the party in whose name it had been filed. This.

omission of a plain duty, and his failure to look to its prosecution, not only endangered the allowance of the claim, but its safety when allowed.

As well might it be said that if money is in bank belonging to the ward, but to the credit of an irresponsible party, and one who is not entitled to it, that the guardian, with knowledge of all these facts, can stand supinely by for years, and until the party has drawn the money, and then say that he is not responsible because it had never come to his hands. It seems to us that common care required the guardian, within a reasonable time after his qualification, to ascertain the character of the claims, their progress toward a settlement, and to have notified the department in some way, as he could easily have done by a copy of the order appointing him, or even by a letter, that he was the guardian.

Upon the contrary, from September 2, 1874, until September 4, 1876, he does nothing whatever in this direction, not even so much as making an inquiry as to the claims. If the money had been drawn by Bryan shortly after the qualification of Milliken as guardian, the case would be different; but none of it was paid for six months thereafter—the greater portion of it not until July 31, 1875, and some of it not until June 22, 1876.

The record shows an utter lack of all diligence upon his part, and such gross and supine neglect that were he to be exonerated there would be no liability upon the part of trustees, save in case of fraud or willful wrong.

It is the first duty of a guardian, after his pa-

pointment and qualification, to take possession of the ward's estate, and to inquire into its condition, and take reasonable precautions to protect it from loss. In this instance the guardian could easily have taken such steps as would have saved the money wrongfully obtained by Bryan to the estate. The circumstances were such as to put him upon his guard, and the exercise of reasonable care upon his part, within a reasonable time, would have prevented the loss. The want of what was an evident needed precaution by him occasioned it. It was not a case for the exercise of his discretion, but one where a plain duty was imposed upon him; and if it had been performed, even to the slight extent of informing the department that he had become the guardian, or by even an inquiry by him as such trustee as to the condition of the claims, the loss would have been averted.

It was said in the case of *Cross v. Petree*, 10 B. M., 413:

"A trustee who, in the faithful discharge of his duty, has, in a mere matter of judgment or discretion, fallen into an error that has resulted in an injury to the persons interested in the trust, is not, in the general, responsible for the loss, where he has acted in good faith, and not been guilty of gross negligence.

"But there is an obvious distinction between cases where there is no discretion to be exercised, but a plain and positive duty imposed, and those where such a discretion must, from the very nature of the act to be performed, exist and be exercised, and

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where the judgment of the trustee must, upon a survey of the whole matter, determine the line of conduct most advisable for him to pursue.

"In the former case he is not required to determine what course is most advisable to adopt; *it is his duty to act*, and if he fail to do it and loss ensues, he will be liable for it."

The case of Hemphill, &c., v. Lewis, 7 Bush, 214, supports this view of the law.

The distinguished Chief Justice who delivered the opinion in that case said:

"When the law intrusts the estate of an incompetent infant to the care and protection of a guardian, the fiduciary undertakes to be vigilant, faithful and competent. These elements of qualification imply as much knowledge of law as may be necessary for safety; this, however procured, he assumes to possess and properly exercise."

Any other rule would hazard the estate of every ward beyond that of the guardian himself; and it must prevail over any sympathy which may arise in a particular case.

Our conclusion is that the appellees are liable for the several sums collected by Bryan, with six per cent. interest thereon from March 6, 1880, it being the date of the filing of the amended petition; and the judgment is reversed for a judgment and further proceedings consistent with this opinion.

JUDGE PRYOR DELIVERED THE FOLLOWING DISSENTING OPINION:

Bryan was appointed guardian for one Boaz, who had no estate, but was entitled to a bounty or pen-

sion by reason of services rendered by his father as a soldier in the late civil war.

He employed an attorney, and after several years' effort to obtain the pension resigned his office as guardian, and the appellee, Milliken, was appointed guardian in his stead.

The appointment of Milliken was made by the Simpson County Court in the month of September, 1874. It may be properly inferred from the record that the appointment of Milliken was for the purpose of prosecuting the claim for the pension and collecting the money.

A guardian before he can obtain this pension money from the pension agent is required to take an oath of his loyalty to the Constitution, and, in addition, must show by two witnesses that he is still guardian, and that his ward is alive.

After Bryan had resigned his office, which was in September, 1874, he obtained in June, 1875, the certificate of the county clerk of his county that he was still the guardian, with the statement of two witnesses that his ward was still alive, and on the seventeenth of July, 1875, took the oath as to his loyalty, and on the thirty-first of July, 1875, receipted to the pension agent for one thousand two hundred and thirty-six dollars, the pension money that the ward was then entitled to. So this former guardian, within ten months after Milliken had been appointed, collected this money, and having failed to account for it, and being insolvent, Milliken is sought to be made responsible by the administrator of the ward, the latter having died after this money

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was received. He also collected other small sums, but the one thousand two hundred and thirty-six dollars is the principal sum in controversy.

The court below decided in favor of Milliken, but this court has reversed that judgment.

It is difficult to perceive upon what theory the responsibility of Milliken is to be placed; that Milliken is liable, if the money had been lost by any neglect on his part that shows a want of ordinary diligence will be conceded, and his liability must depend on the facts from which this negligence is sought to be established.

There is no proof whatever that Milliken knew that the pension or bounty money had been allowed; but, on the contrary, the plain inference from the record is that he was entirely ignorant of any final action on the claim. He knew that the former guardian had made the application through an attorney, and with the delays attending the prosecution of such claims, and the security of the claim when allowed being so apparent, he doubtless made no inquiry within the ten months. He knew the money would be in the vaults of the treasury, if the claim was allowed, a safer deposit than in his own pocket, and had no right to anticipate the bad faith of the former guardian, or that he would or could arm himself with the certificate of the county court clerk that he was still the guardian to enable him to get this money. It may be, and is urged, that Milliken should have notified the pension department that he was the guardian, and for that reason was guilty of negligence. Why should he have notified

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the agent of the government, or filed the evidence of his appointment, before he was entitled to draw the money? If an insurer of the fund, it was his duty to do so, or if he had reason to believe that the former guardian would practice such a fraud, he might and ought to be held responsible. Ordinarily the debtor paying the money to one who has been removed, or is not the guardian, would still remain liable to the real guardian; but in this case Milliken can not sue the government, and it is entirely optional with those in power whether they will again pay it; in fact, would require legislation on the subject.

The only negligence Milliken has been guilty of consists in failing to use such diligence as would prevent one whom he had the right to believe was perfectly honest from stealing this fund. If he had known the fund was in the treasury for him, his permitting it to remain there for nine or ten months without using it would not constitute gross neglect. How many business men permit money to remain in a place of safety for a much longer time without even interest as a precaution against loss?

It is not bad faith or gross neglect for a guardian to permit his ward's funds to remain in the vaults of the government for ten months without withdrawing them. He may be chargeable with interest, but if some one else withdraws the money by deception and fraud, the guardian is not responsible. Where the guardian has acted in good faith, and not been guilty of gross neglect, he is not responsible. He may indulge the debtor to his ward from time to

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time without suing him, and if the debtor should become insolvent he is not responsible unless he had reason to believe that his failure to sue would result in loss to his ward. So in this case he had every reason to believe, the government being the debtor, that the claim when allowed would be perfectly safe, and the only reason he can be held bound is his failure to anticipate the dishonest conduct of Bryan, and to give the pension agent notice of the fact that he was entitled to the money, and not Bryan.

This is a higher degree of diligence than the conduct of any such fiduciary should be measured by, and instead of making him responsible for failing to do that which an ordinarily prudent man would have done under the circumstances, he is in fact made an insurer of the ward's money.

For these reasons I must dissent from the opinion rendered. (Cross v. Petree, 10 B. M., 413.)

CASE 89—PETITION ORDINARY—FEBRUARY 23.

Green & Barren River Nav. Co. v. Palmer.

APPEAL FROM WARREN CIRCUIT COURT

WATER-COURSES—TOLLS.—A company to which the Legislature has given the right to construct locks and dams upon a navigable stream, and to charge tolls for boats, rafts, etc., passing through the locks, has no right to charge tolls for rafts which do not pass through the locks. During high water, when navigation is unobstructed, such streams are free for all the purposes of navigation.

WRIGHT & McELROY FOR APPELLANT.

Appellant's charter empowers it to collect tolls from boats, barges, and rafts *whenever they start within the influence of slack-water*. There

83	646
88	11

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is no exemption, except that when they do not pass through the lock they pay no lockage. (Act of March 9, 1868; 2 Revised Statutes, page 69, sections 12 and 16; Act January 1, 1852, 2 Revised Statutes, pages 78-4; Act January 6, 1860, 2 Revised Statutes, page 815; Report of Board of Internal Improvement of 1866, page 26; Act of March 15, 1876; Act of March 14, 1878.)

JOHN L. SCOTT FOR APPELLEE.

Appellee had the right to float his timber to market on the tide without the use of the locks, and he did so. As the locks rendered him no assistance, he is not chargeable with tolls.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The Green and Barren River Navigation Company brought this action against the appellee, Palmer, to recover three thousand seven hundred and eighty dollars as tolls for floating out of the Barren and Green rivers his rafts of saw logs during the high tide some years ago, these rivers being so high that the rafts passed over the locks instead of through them. These facts appearing on the face of the petition, a demurrer was sustained thereto and the petition dismissed, the plaintiff declining to plead further.

The common law right of the public to navigate such rivers can not be disputed; and in England, Chancellor Kent says the crown had no right to interfere with the channels of such streams. The use of such waters was inalienable.

The right of sovereignty has been asserted over these streams through the legislative department of the government, by which locks and dams have been constructed so as to make these rivers navigable during low water; and as an incentive for such improvements the owners, or those having the control of the locks and dams for a fixed period, have the right

to charge certain tolls for boats, rafts, etc., passing through the locks. This legislative power has been exercised as the courts must presume for the public welfare, the State holding and controlling such streams for the public good. While the right to make such improvements and to lease them has been held constitutional, it may be well argued that no such power exists in the Legislature as enables that branch of the government to make an unconditional or absolute disposition of such navigable streams as would prevent the citizen from using them for purposes of navigation, when by reason of high water all obstruction to navigation is removed, and the locks and dams for the time being rendered useless.

But no such right was intended to be conferred by the contract between the State and the appellant. It is only when the craft or other vessel passes through the locks that they have the right to impose the burden; for if otherwise, the company might be held responsible in damages for failing to provide against a rise in the stream from the heavy rains, or made answerable for injuries occurring in passing over the dams during high water. The tolls are charged by reason of the facilities afforded those who pass through the locks; but when navigation is unobstructed, these streams are free for all the purposes of navigation.

The judgment, therefore, sustaining the demurrer must be affirmed.

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CASE 90—PETITION EQUITY—FEBRUARY 27.

Coffin, &c., v. Kelling, &c.

APPEAL FROM KENTON CHANCERY COURT.

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1. A VOLUNTARY ASSIGNMENT FOR THE BENEFIT OF CREDITORS MADE IN ANOTHER STATE will pass personal property in this State as against a subsequent attaching creditor resident here, if the assignment be such as would be upheld and enforced if made in this State.

In this case an assignment made in Ohio transferring all the debtor's property without preference or priority is upheld as to personal property in this State as against a subsequent attaching creditor resident here, it appearing that bond has been executed, and that the assignee has qualified. The contents of the bond not appearing, the court assumes that it is such as is usually required of assignees.

2. COSTS.—As between the attaching creditor and the assignor, the creditor was properly adjudged to pay the costs, it appearing that he knew of the assignment when he obtained the attachment.

HALLAM AND MYERS FOR APPELLANTS.

1. A foreign assignment will not be enforced as against *resident* attaching creditors. (Johnson v. Parker, 4 Bush, 151; Warren v. Union Nat. Bank, 7 Phila., 156; Booth v. Clark, 17 How., 322; Farmers & Mechanics' Ins. Co. v. Needless, 52 Mo., 17; Hope Mut. Life Ins. Co. v. Taylor, 2 Rob., 278; Hunt v. Columbian Ins. Co., 55 Me., 290; Taylor v. Columbian Ins. Co., 14 Allen, 352; Hoyt v. Thompson, 6 N. Y., 320; Osborn v. Adams, 18 Pick., 248; Hurd v. City of Elizabeth, 41 N. J. L., 1; Runk v. St. John, 29 Barb., 585; Bagby v. Atlantic, &c., R. R. Co., 86 Pa. St., 294; Chaffee v. Fourth Nat. Bank, Supreme Judicial Court of Maine, January, 1881, 11 Reporter; Fox v. Adams, 5 Me., 245; Todd v. Darling, 11 Me., 34; Felch v. Bugbee, 48 *Ibid.*, 9; South Boston Iron Co. v. Boston Locomotive Works, 51 *Ibid.*, 585; Pierce v. O'Brien, Supreme Judicial Court of Mass., Sept., 1880, 10 Reporter; Chicago, Mid. & St. P. Railway Co. v. Keokuk F. L. Packet Co., 108 Ill., Burrill on Assignments, secs. 306 and 310.)
2. An assignment under the laws of Ohio is not an assignment by contract such as is valid everywhere, as the statute takes hold of the deed the instant it is made, and gives it the effect of what the statute says.
3. An assignment under the Ohio statute by reason of the large exemption and the preferred claims it allows is against the "well settled

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policy" of Kentucky, and also against our "direct legislation." (Ohio Statutes, secs. 5430, 5441, 6348, and 6355.)

4. It does not appear that there was an acceptance of the trust before the attachment issued, which was necessary to the validity of the assignment. (Burrill on Assignments, section 265.)
5. A bond in Kentucky—a prerequisite to the assertion of any right by the assignee—was never given.

O'HARA & BRYAN FOR APPELLEES.

1. A foreign assignment passes the title to personal property in Kentucky. (Forepaugh, &c., v. Appold, &c., 17 B. M., 625.)
3. If an assignment be in harmony with the laws of the State where the property is situated, the title passes and the rights of the assignee should be protected against subsequent attaching creditors. (Wharton on Conflict of Laws, section 853; Story on Sales, section 515; Brooks v. Marbury, 11 Wheat., 78; Halsey v. Whitney, 4 Mason, 213; Fuller v. Steiglitz, 27 Ohio St., 355; Johnson v. Sharp, 31 Ohio St., 617.)
8. The case of Johnson v. Parker, &c., 4 Bush, 151, distinguished.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellants, Samuel Coffin and others, citizens of Kentucky, holding claims against the appellee, Kelling, who was a citizen of Ohio, attached certain coke and barges as the property of Kelling, with a view of subjecting it to the payment of their debts.

Wolfe, another appellee, and also a resident of Ohio, claimed the property by virtue of a deed of assignment made to him by Kelling for the benefit of creditors prior in date to the attachment levied by the appellants.

As assignee of Kelling, Wolfe was permitted to intervene, and upon the hearing in the court below it was adjudged that the assignee for creditors was entitled to the property as against the attaching creditors, and of that judgment the latter complains.

The position assumed by counsel for the appellant is, that as the attaching creditors were citizens of

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Kentucky, no assignment made in the State of Ohio should affect the claims of creditors who had seized the personal estate of the debtor in Kentucky for the payment of their debts. In other words, that where the creditor is a citizen of this State, and the property of the debtor is within its territorial limits, the right of the creditor here is not to be affected by the assignment of the insolvent debtor in another State for the benefit of creditors. The case of *Johnson v. Parker*, 4 Bush, 149, is relied on as sustaining this view of the question.

In that case this court seems to have been reluctant to pass on the question, because, as is plainly intimated, no direct judicial decision had been referred to on the subject, and proceeded to deny priority to the appellant (the assignee), because there was nothing in the record showing that any security had been given by the assignee for the just and proper distribution of the debtor's estate or its proceeds between creditors, holding that "*comity requires reciprocity.*" Local bankrupt laws, as said in that case, have *proprio vigore* no extra territorial operation, the principle of international comity not requiring the courts of one government to enforce such a law to the prejudice of the domestic creditors. The court in that case, however, recognized the difference between an assignment by law, which is local, and an assignment by contract; and while it must be conceded that the reasoning in *Johnson v. Parker* conduces to sustain the claim of the attaching creditor, the question here made was not determined, but the case decided adverse to the assignee for other reasons.

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While there is much contrariety of opinion with both elementary writers and in judicial decisions as to the effect to be given assignments of personal property, it is certain that an assignment made in one State contrary to the settled policy of another State will not be enforced by the latter so as to prejudice the rights of its own citizens who are creditors; but where such an assignment is in harmony with or in the line of policy with reference to the rights of creditors residing in the State where the assignee is asserting his claim, we perceive no reason why the assignee in a voluntary assignment made in another State should not be aided by the courts of this State in securing the property of the debtor that it may be distributed *pro rata* between all the creditors, whether citizens of this State or beyond its jurisdiction.

Such an assignment as was made in this case would have been valid here, and the rights of creditors are secured by the bond of the assignee, which seems to have been the principal objection in the case of *Johnson v. Parker*.

In *Guillander v. Howell*, 35 N. Y., 657, where the assignment preferring a creditor was made in New York, and at the time personal property embraced in the assignment was in the State of New Jersey, and was seized by a resident of the latter State under an attachment, the New Jersey creditor was allowed to subject it, because by the law of that State such preferences were invalid; and when such questions arise the right of the assignee to claim personal property located in another State than that

in which the assignment is made as against domestic creditors must depend upon the character of the assignment, for if against the policy of the State law where the claim is asserted, it will not be enforced as against its own citizens. (Burrill on Assignments, sections 302, 307, 4th ed.)

If such an assignment, voluntary in its character, made by the debtor for his creditors is valid where made, it should be upheld everywhere, unless the policy of the State where it is sought to be enforced forbids it. Chancellor Kent says:

“The acts of parties valid where made, shall be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State.”

The authorities relied on by counsel for the appellant apply to assignments made by operation of law, or to the assignment of choses in action where such assignments are not allowed, or to the action of courts in placing property in the hands of a receiver or to foreign bankrupt laws, and where the transfer of the property of the debtor is involuntary. “An assignment by law has no legal operation out of the State in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes.” (Burrill on Assignments, section 303, 4th edition, and a number of cases there cited.)

In the one case the owner disposes of his own property for a consideration that is valuable and to be commended, and in the other the foreign tribunal, without the consent of the owner, takes

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charge of his estate, appoints the trustee, and disposes of the trust property. The transfer to the assignee is not only against the will of the owner, but would be void but for the law of the State that determines the insolvency, and passes the estate of the debtor into other hands without his consent. This seems to be the reason given by the text-books, and the decisions on the subject, for the distinction between voluntary and involuntary assignments.

The courts of this State will recognize the right of the owner to dispose of his property by contract, and will uphold such right although made in another jurisdiction, when not against the policy of our law, or plainly injurious to the rights of the resident creditor.

In the case of *May v. Wannemacher*, 111 Massachusetts, 202, it was held, in discussing a similar question, that an assignment made in Pennsylvania was entitled to preference over the attaching creditor in Massachusetts; that the assignment in no respect contravened the policy of the law as established in Massachusetts, and, therefore, was effectual to pass the rights of the debtor even to property not subject to the local laws of Pennsylvania.

In the case of *Moore and others v. Willett*, 35 Barbour, 663, the transfer was made in North Carolina, and the property afterwards seized under execution in the State of New York; it was held that the assignment must prevail as against the execution creditor.

In *Law v. Mills*, 18 Pa. State, 185, the debtors executed an assignment in the State of New York

that was held good against the attaching creditor in Pennsylvania, the court going so far in that case as to say that a voluntary assignment in trust is to be ascertained by the law of the place of its origin; and although the transfer in that case made a preference between creditors that was forbidden in the State of Pennsylvania, it was adjudged that as it was not in contravention of the law where it was executed it must prevail.

The Supreme Court of Ohio, the State in which the assignment in the present case was made, in the case of *Johnson v. Sharp*, 31 Ohio St., 617, held that the assignee of the debtor was entitled to the property as against subsequent attaching creditors. The assignment in that case was executed in the State of Missouri, and the property was in the State of Ohio, where the creditors also resided; still the question involving the principle upon which the recovery in this case was made to depend was in that case discussed and decided. That court, in the opinion rendered, said:

“The decided weight of authority in this country is that our courts will not subject our citizens to the inconvenience of seeking dividends under a foreign assignment in bankruptcy when they have the means of satisfying their claims at home, and probably the same may be said when the preference is sought over any involuntary assignment of the debtor's property made in *invitum* or by operation of law. But it appears to us that a different rule should be maintained where a voluntary assignment is made in one State of the Union of property situate in another. *

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* * The common right of every one to dispose of his property wherever he may be, and a reasonable acknowledgment of the principle of comity which should exist between the sister States of this Union, would seem to require a different rule, and such doctrine has been recognized in several of the States." (Johnson v. Sharp, 31 Ohio State, 619.)

A settled rule affecting the assignment and transfer of personal estate prevailing in our sister States, and adopted or followed in this State, can work no hardship on our citizens. The creditor here may be put to the inconvenience of presenting his claim to the assignee for payment in a different jurisdiction, but the same rule would apply to the creditor in Ohio where the assignment had been made in Kentucky. The only question in this case, it seems to us, is, would the assignment made in Ohio have been valid and enforced in this State if made here? If so, a subsequent attaching creditor should not be allowed to defeat the claim of the assignee.

There is nothing in this case inconsistent with the line of policy adopted in this State upon this subject, either in the statute of assignments or the judicial decisions under it.

All of the debtor's property is transferred and conveyed to the assignee for creditors without any preference or priority. A bond is certified to have been executed, and the assignee has qualified, and while the contents of the bond is not made to appear, the court will presume that it is such a bond as is usually required of assignees. What the costs of the proceeding in Ohio may be, or the

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character of the exemption laws in that State, we are not informed, nor is it necessary that this court should be, before enforcing the claim of the assignee. No complaint is made that the Kentucky creditor will not obtain his *pro rata* portion of the proceeds of the debtor's property, or rather no fact established that would authorize this court to assume that the property is to be wasted in costs or made the prey of too liberal exemption laws.

It appears from the pleadings in the case that the appellant knew of the assignment when he obtained the attachment, and as between the attaching creditor and the assignee, the creditor was properly, adjudged to pay the costs. No judgment has been rendered against the debtor for the claim, but that branch of the case seems to have been continued.

The judgment below must be affirmed.

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CASE 91—PETITION EQUITY—FEBRUARY 27.

Adams Express Co. v. City of Lexington.

ONE STATUTE WILL NOT BE REGARDED AS REPEALING ANOTHER BY IMPLICATION unless they are absolutely irreconcilable, or there is sufficient reason to conclude the Legislature so intended.

Foreign express companies being exempted by statute from local taxation by the payment of the State tax for the privilege of doing business, a provision in the charter of the city of Lexington authorizing it to impose a license tax upon "each" express company can not be held to apply to *foreign* companies.

BRECKINRIDGE AND SHELBY FOR APPELLANT.

A statute is not repealed by implication, unless there is such a positive repugnancy between its provisions and the provisions of a subsequent statute.
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quent statute that the two can not stand together or can not consistently be reconciled.

The charter of appellee must be construed as authorizing the imposition of a license fee on express companies *other than foreign express companies*, which are alone exempted by the general law. (Broom's Legal Maxims, pages 28-9; E. & P. R. R. Co. v. Trustees of Elizabethtown, 12 Bush, 287; Loran v. City of Louisville, 4 Ky. Law Rep., 257; Seifred v. Commonwealth, 15 Cent. Law Journal, 419; Acts 1869-70, volume 1, page 88.)

JOHN R. ALLEN FOR APPELLEE.

The charter of appellee authorizes the imposition of a license fee on "*each* express company." This language applies to both foreign and domestic companies, and must be construed as repealing the general law exempting *foreign* express companies in so far as it applies to the city of Lexington. The conflict can not be reconciled so as to give effect to both statutes.

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The Legislature, by the act of March 2, 1860 (Myers' Sup., page 228), required all *foreign* express companies to obtain annually a license from the State Auditor, as a condition to their right to do business in this State.

By another of February 20, 1864, *all* express companies doing business in Kentucky were required to annually report to the Auditor a statement of their business, and pay into the treasury a tax of six per cent. upon the net profits arising from it. (Myers' Sup., page 480.)

On March 2, 1870, an act amendatory of the one last named was passed, by which *foreign* express companies were required to pay for the privilege of doing business in this State a tax of five hundred dollars, if the line was one hundred miles or less in length, and one thousand dollars if over; and it was further provided, that "any such company which

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has taken or may take out the license provided for in said act of March 2, 1860, and shall pay the annual tax provided for in this act, shall not be required by any county, town, city or other corporation or local jurisdiction in this State to take out or obtain any other or additional license, or to pay any other or additional tax or sum of money for the right or privilege of conducting its business in or through such county, town, city, corporation or other local jurisdiction." (Acts of 1869-70, volume 1, page 33.)

The charter of the city of Lexington, approved April 19, 1882, provides:

"Sec. 16. That the mayor and board of councilmen shall have the right to tax and license, and shall by ordinance provide for the licenses for the following businesses, professions and employments, with adequate penalties for doing business without the required license: * * * for each intelligence office, claim agent, commercial agent, street broker, pawnbroker, *express company*, * * * not less than ten dollars nor more than two hundred and fifty dollars." (Acts of 1881-'2, volume 2, page 617.)

The only question to be considered is, whether the above charter provision, authorizing the city to require "*each*" express company to obtain a license, repeals the exemption from such taxation given by the act of March 2, 1870, *supra*, to *foreign* express companies as to the city of Lexington.

Clearly it does not do so *expressly*. The one is not an amendment of the other, and can not be

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held to annul the exemption save by *implication*. Such repeals are not favored. One statute will not be regarded as repealing another by construction, unless they are absolutely irreconcilable, or there is sufficient reason to conclude that the Legislature so intended; and such a construction will not be given to *general* words as to so operate as to a *particular* statute, unless the words can not otherwise have their proper operation.

The act of March 2, 1870, indicates a general policy upon the part of the State to exempt foreign express companies from local taxation by the payment of the State tax; and it is unreasonable to suppose that the Legislature intended to reverse this policy as to and for the benefit of *one particular local jurisdiction*.

If it had seen proper to say that all towns and cities should have the power by ordinance to tax and license "each" express company, the legislative intent would have been plain. It is true that the word "each" denotes every one of the two or more comprising the whole; but in this instance it must be regarded as indicating that the license fee for each of the companies intended to be included in the provision of the charter, and which were not exempted from city taxation by the then existing law, should be so much. It includes the whole of the class which were not then exempt from such taxation. Such a construction leaves both provisions in force, and authorizes the city to tax and license all express companies, save foreign ones. If this be not the correct one, then it follows that the Legis-

lature intended to reverse the policy announced by the act of March 2, 1870, in favor of one city, and permit it to impose a tax upon the company equal to one-fourth of that paid to the State; and this, too, without even a reference to the act, a portion of which it is claimed was repealed as to one municipality. In the case of the E. & P. R. R. Co. v. Trustees of Elizabethtown, 12 Bush, 233, the 28th section of the charter of the railroad company provided:

“Said Elizabethtown and Paducah Railroad Company shall be exempt from taxation till completed; and that it shall never be taxed at a valuation beyond the rate at which said (other) roads are now taxed by law.” (Acts 1867-'8, page 629.)

The amended charter of Elizabethtown, approved February 17, 1871, authorized it to levy and collect “a tax on railroad companies for all property owned by said companies in the limits of Elizabethtown, except rolling stock, such as freight and passenger cars, to be levied at the same rate on the value as may be assessed upon the property of private individuals.”

This language apparently included all the railroads in the town, and authorized it to at once proceed to levy the tax. It was, however, held by this court that the charter provision did not repeal the exemption in favor of the E. & P. Railroad, and the opinion says:

“If by fair and legitimate interpretation two acts of the Legislature that are seemingly incompatible or contradictory may be enforced, they will both be

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upheld, and the one will not be regarded as repealing the other by construction, unless there is reason to conclude that the Legislature intended that the subsequent act should control the former. In this case the fair inference is that in amending the charter of Elizabethtown the Legislature did not have the special express exemption from taxation for a limited period of time enjoyed by the appellant in view at all; and it is impossible to suppose that the intention was to override that exemption for the benefit of the municipal government."

The inference is irresistible that the Legislature did not, by the charter provision now in question, intend to repeal, as to a single municipality, the exemption in favor of foreign express companies then existing generally as to the towns and cities of this Commonwealth, and that when it enacted the charter provision under consideration it did not have in view the act of March 2, 1870.

Judgment reversed, with directions to overrule the demurrer to the petition, and for further proceedings in conformity to this opinion.

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CASE 92—PETITION EQUITY—FEBRUARY 27.

Croninger, &c., v. Marthen.

APPEAL FROM KENTON CHANCERY COURT.

1. INTEREST ON CLAIM AGAINST DECEDENT'S ESTATE.—Notwithstanding the provision of the statute that no interest accruing after the death of a debtor shall be allowed on a claim against his estate, unless the claim be verified and payment demanded of the per

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sonal representative within one year after his appointment, interest may be allowed if the personal representative has waived demand, provided he is the only person who will be affected by allowing interest.

In this case the request by the executor that appellants should postpone the collection of their demand to enable him to pay without a sale of the decedent's real estate, and the promise and assurance given that their claim should be paid in full, ought to be construed as a waiver of the demand, so as to allow interest, the executor himself being the only other creditor, and the estate not being sufficient to pay both debts.

2. IT WAS THE DUTY OF THE EXECUTOR and of the testator's widow, as executrix, to first pay the debts against the estate as directed by the will, and the collection and appropriation of the rents from the testator's real estate, as well as the appropriation of the personalty, for any other purpose was illegal and unauthorized, and settlements made by the executor in the county court in which he was credited by payments made to the widow out of the rents, and for services rendered by him in collecting such rents, were improper.
3. SETTLEMENTS MADE BY A PERSONAL REPRESENTATIVE in the county court, although erroneous, were properly made the basis of a Master Commissioner's report, as they were not attacked by the pleadings in this action by creditors for a settlement of the estate.

WM. E. ARTHUR FOR APPELLANTS.

1. The verification, authentication and demand within the year was waived by the personal representatives, and appellant is entitled to recover interest from the date of his claims. (Howard's Adm'r v. Leavell's Adm'r, 10 Bush, 483; General Statutes, chapter 39, article 1, sections 35, 40 and 53; Johnson v. Belt, 4 Bush, 405; Thomas v. Thomas, 15 B. M., 184; Trabue v. Harrison, 1 Met., 600; Holmes v. Lusk, 78 Ky., 548; McCann v. Bell, 79 Ky., 112.)
2. The income of the realty was not assets which the personal representatives had any right to receive. (General Statutes, chapter 21, section 13, page 246; *Ibid.*, chapter 39, article 1, section 5, page 441; Heeter v. Jewell, 6 Bush, 512; Wilson, Guardian, v. Unsell's Adm'r, 12 Bush, 215; Oldham v. Collins, 4 J. J. M., 50; O'Bannon v. Roberts, 2 Dana, 54; Muldoon v. Crawford, 14 Bush, 129; Speed, &c. v. Nelson, 8 B. M., 505; Smith v. Bland, 7 B. M., 505.)
3. The personal representatives are liable to the creditors for the income collected from the realty.

The executor resided out of the Commonwealth, and was all the time legally incompetent, and the county court should have removed him. (General Statutes, chapter 39, article 1, section 19, page 444; McKenzie v. Pendleton, 1 Bush, 164; Finnell v. Meaux, 3 Bush,

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450; *Brown v. Durbin*, 5 J. J. M., 172; *Vance v. Vance*, 5 Mon., 521; *Muldoon v. Crawford*, 14 Bush, 129; *Wilson v. Unselt*, 12 Bush, 216; *Young v. Wickliffe*, 7 Dana, 448; *Faucett v. Faucett*, 1 Bush, 514; *Berry v. Hamilton*, 12 B. M., 198; *Dunlap v. Kennedy*, 10 Bush, 542.)

4. As against appellants the settlements in the county court of receipts and disbursements of realty income are void. Appellants resided in the county; they had no notice of the time and place of said settlements, and were not parties to either. (General Statutes, chapter 28, article 14, sections 8, 9, page 304; *Saunders v. Saunders*, 2 Litt., 814; *Wooldridge v. Watkins*, 8 Bibb, 850; *Hart v. Hart*, 2 Bibb, 609; *Muldoon v. Crawford*, 14 Bush, 129; *Wood v. Lee*, 5 Mon., 61; *Blakeley v. Holton*, 5 Dana, 529; *Kellar v. Beeler*, 5 Mon., 576; *Beeler v. Hill*, 5 Dana, 44; *Logan v. Troutman*, 3 Mar., 66; *Moore v. Beauchamp*, 5 Dana, 75.)

D. A. GLENN FOR APPELLEE.

1. The court will not decide that there was a waiver, unless it can conclude from the evidence that a waiver was intended by the parties. No such intention appears. On the contrary, it is apparent that appellant did not make demand within the year, because he was ignorant of the requirements of the law.
2. The Chancellor can not surcharge the county court settlements, as they are not attacked by the pleadings.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

As the widow of Edward Hoyt, deceased, did not renounce his will, but elected to accept the estate devised to her by it, it was the duty of herself, as executrix, and appellee, A. W. Marthen, as executor, to first pay the debts against the estate as directed by the will; and the collection and appropriation of the rents from the house and lots, as well as the personalty, for any other purpose, was illegal and unauthorized; and the settlements in the county court, made by the executor, Marthen, one just before the commencement of this action, and the other during its pendency, in which he was credited by payments made to the widow out of the rents, and for services rendered by him in collecting such

rents, were improper and unauthorized; but as the plaintiff in this action did not attack those settlements, or seek to have them surcharged and set aside, the lower court, as the pleadings stood, properly sustained the report of the Master Commissioner, which was based on them.

We think, however, the court erred in failing to render judgment for all claims of appellants, and interest on each of them up to the time they are to be paid out of the proceeds of the sale of the house and lot, notwithstanding section 53, article 2, chapter 39, General Statutes, which is as follows:

“No interest accruing after his death shall be allowed or paid on any claim against a decedent's estate, unless the claim be verified and authenticated as required by law, and demanded of the executor, administrator or curator within one year after his appointment.”

The testator died in 1874, and the executor and executrix qualified November 23, 1874; but notwithstanding they knew the estate to be insolvent, and that the realty would have to be sold to pay the debts due to appellants, the nature and amount of which they knew, yet they failed to either apply the personalty for that purpose, or to institute an action for a settlement and sale of the real estate, but continued to collect rents from the house and lot left by the testator, and appropriate them to their own use, until this action was commenced by appellants in 1883 for such sale and application of the proceeds to pay their demands.

It appears, moreover, that a short time after the

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death of the testator, appellants presented their demands to the executor and executrix, and payment thereof in full was promised; but they requested appellants to allow them time in order that they might raise the funds with which to pay the claims without a sale of the house and lot. And appellants having thus been induced to postpone the collection of their debts, did not until 1876 institute any action to subject the house and lot. And that action was in pursuance of the written agreement of the executor, A. W. Marthen, made in June, 1876, to admit the correctness of their claims in full, dismissed.

But after the commencement of this action, the widow and executrix being dead, two notes for seven hundred and eighty-five dollars and eighty-four cents and one hundred and one dollars and twenty cents, purporting to have been executed in 1869 and 1873 by the testator to A. W. Marthen, and in writing assigned to his wife in November, 1876, were for the first time presented and judgment in her favor against the estate prayed for.

At the time the first action was commenced by appellants in 1876, these two notes were held by A. W. Marthen in his own name, and the date of the assignment to his wife is subsequent to the dismissal of that action; but appellants say they did not know of their existence until after the present action was commenced in 1883.

The issue now presented is virtually between appellants and A. W. Marthen and his wife, holder of the two notes assigned to her by him for an un-

explained reason and without consideration, and not between appellants and the devisees and other creditors, for there are no others.

The house and lot sold for the sum of only three thousand one hundred and ninety-two dollars, which constitutes the only fund with which to pay debts, the amount of the personalty, as well as rents, having been appropriated almost entirely by the executor and executrix for their own benefit, but accounted for and allowed to them in the county court settlement.

The amount of appellants' claims allowed in the judgment appealed from is one thousand seven hundred and thirty-eight dollars and sixty-one cents, though it should have been, even upon the basis adopted by the lower court, two thousand one hundred and two dollars and sixty-one cents. The amount of the two assigned notes claimed by appellee, Eliza J. Marthen, and allowed, is one thousand two hundred and twenty-nine dollars, and the amount allowed to appellee, A. W. Marthen, being balance in his favor in county court settlement, is four hundred and ninety-three dollars.

It will be thus perceived that the fund is not sufficient to pay all the debts, and consequently, if appellants are allowed interest on their claims from the death of the testator in 1874, which was denied them in the judgment appealed from, the *pro rata* share payable to appellee, A. W. Marthen, the executor, and his wife, will be proportionately diminished, but the interest of no one else will be affected.

The object of the statute requiring proof and affi-

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davit of claims against the estate of a deceased person is to give the personal representative an opportunity to pay and use them as vouchers without subjecting the estate to the costs of litigation, and the object of the section we have quoted is to prevent the unnecessary accumulation of interest on such demands by the delay of creditors in duly proving and demanding payment.

But it has been held that the personal representative may waive the demand either before or after suit by the creditor. (Thomas' Executor v. Thomas, 15 B. M., 184; Howard's Administrator v. Leavill, 10 Bush, 482.)

In this case the request by the personal representatives that appellants should postpone the collection of their demands to enable them to pay without a sale of the house and lot, and the assurance and promise given that their claims should be paid in full, ought to be construed as a waiver of the demand, particularly as not to do so would enable one of the executors, Marthen, to profit individually by his own bad faith, as well towards the estate as to the creditor; for he not only kept concealed from appellants the existence of the two notes he held against the testator, but, in violation of his official duty, continued to collect rents and profits from the house and lot, which were applied not to pay creditors, but for the use of himself and the executrix, and in the end claimed a balance against the estate in favor of himself, arising out of his illegal transaction; and if the county court settlement had been attacked in this action, we would not hesi-

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tate to say that he should be compelled to look alone to the rents collected for payment of whatever claim he may have against the estate.

Whether, if the contest here was between appellants and other creditors or the devisees, interest should be allowed after the death of the testator, it is not necessary to decide; but as the record now stands appellants ought to have each of their claims, and interest on each up to the date of distributing the fund in court, and they are also entitled to the entire amount paid for medical bill and funeral expenses after the death of the testator, and like interest thereon from the date of such payment, which, as to the funeral expenses, is to be paid as a preferred claim.

The judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

CASE 98—PETITION EQUITY—MARCH 2.

Cox, &c., v. Gill.

APPEAL FROM BARREN CIRCUIT COURT.

MISTAKE IN OFFICER'S CERTIFICATE—ACKNOWLEDGMENT OF MARRIED

WOMAN.—Where the deed of a married woman is acknowledged before one authorized to take the acknowledgment, and the officer's certificate is regular and proper on its face, an allegation of mistake upon the part of the officer will not authorize the admission of parol testimony to contradict the legal effect of the certificate by showing that the clerk took the acknowledgment out of the county, or that the husband was present when the deed was acknowledged by the wife, or that the clerk failed to read and

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89	513
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explain the contents of the deed to her. The mistake for which the officer's certificate may be called in question is not a mistake as to the form or manner of acknowledgment.

In this case the land conveyed is in Barren county. The certificate of the clerk of the Barren County Court shows that the deed was properly acknowledged by both husband and wife. Under an allegation of mistake on the part of the officer, the grantors seek to show that the acknowledgment was taken in Metcalfe county, that the deed was not explained to the wife, and that she never consented that it might be recorded. *Held*—That the certificate is conclusive as to these facts, and can not be called in question even under an allegation of mistake.

T. T. REYNOLDS FOR APPELLANTS.

The cause was prematurely submitted, as the time allowed by law to the defendants for filing their rejoinder had not expired. This was a clerical misprision, for which the judgment should be reversed. (Civil Code, sections 106, 864 and 517.)

BOLES & DUFF FOR APPELLEE.

1. The cause was submitted for trial and judgment without objection, and, therefore, appellants can not complain that the submission was premature.
2. As the plaintiff's demurrer to the answer as amended should have been sustained, the judgment must be affirmed, even though the submission was premature.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Under the provisions of chapter 81, section 17, General Statutes, "no fact officially stated by an officer in respect of a matter about which he is required by law to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer, unless in a direct proceeding against the officer or his sureties." Prior to the passage of this statute, it had been held in *Ford v. Teal*, 7 Bush, 156, and other cases, that it was competent to prove by parol that a deed exe-

cuted by a *feme covert* was not read or explained to her, or that her husband was present when she acknowledged it, and in that manner avoid the deed so far as it affected the married woman.

In order to make the title to real estate the more secure the statute in question was passed, and no such testimony was admitted, unless a mistake on the part of the officer was shown or fraud on the part of those interested. Before this statute was passed or became operative, in *Harpending's Ex'r v. Wiley*, 14 Bush, 380, where the question involved here was directly presented, it was held that the statements made by the officer could not be contradicted by parol evidence, and when the certificate was valid it passed all the title of the parties to the real estate who executed and acknowledged the conveyance.

In this case, under the allegation of a mistake in the answer on the part of the officer, it is maintained that the certificate was erroneous in every particular, and if the defense is held good, the facility for attacking such acknowledgments is increased instead of diminished by the statute.

It is of the greatest importance to purchasers that some protection should be afforded them in the transmission of title to realty, and if the allegation of a mistake as to the county and the mode of privy examination of the *feme* by the clerk or his deputy is permitted, then the validity of all such conveyances will depend as much upon parol evidence as the certificate of the officer authorized by law to take the acknowledgment. The certificate, ac-

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knowledgment, and the recording of the deed shows to the purchaser or the remote vendee that the title is complete, yet the parties conveying (husband and wife) will be allowed to show a mistake of law or a mistake of fact in regard to the examination of the *feme*, and thereby divest the purchaser who has parted with his money of all title.

It is not alleged that any fraud was practiced by the parties. The land conveyed is in Barren county. The acknowledgment of the deed is proper by both husband and wife, and before the clerk of Barren county, and this fact admitted by both the grantors. They say, however, that they were in Metcalfe county when the deed was acknowledged, and that the writing was not explained to the wife, and she never consented that the deed might be recorded, and, therefore, the indorsement was a mistake. We can well see how a fraud might be perpetrated by the clerk in certifying that he took an acknowledgment, when, in fact, none was ever taken, or a mistake in certifying that A had signed and acknowledged the deed, when, in fact, it was B that signed it; but when the parties admit the execution of the deed and the acknowledgment before the clerk of the county where the land lies, or before the clerk where they reside, and the clerk's certificate is in accordance with law, they will not be permitted to show, under the allegation of a mistake, that the certificate was not in the form of or as required by law, or that the clerk was out of the county when he took the acknowledgment.

When the certificate is regular and proper on

its face, and admitted to be signed, and the deed acknowledged before one authorized to take the acknowledgment, what the clerk states as to when it was acknowledged, and the manner of acknowledgment, can not be assailed on the idea that the clerk has made a mistake, and parol proof allowed to contradict the legal effect of the certificate by showing that the clerk certifying took the acknowledgment somewhere else, or that the husband was present when the deed was acknowledged by the wife, or that the clerk failed to read and explain the contents of the deed to her. Here the parties have conveyed land in Barren county. The husband and wife both admit the signing of the deed. They further admit the acknowledgment before the clerk or deputy of the Barren County Court. The clerk's certificate is in due form, and now it is urged that the clerk failed to do what the legal effect of his certificate imports, and, therefore, there was such a mistake as will admit parol testimony to contradict the certificate.

The mistake contemplated by the statute does not apply to the form or manner of acknowledgment. Was he the proper officer? Did the parties named in the deed sign it, and did they acknowledge it before the officer authorized to take the acknowledgment? Is the certificate valid on its face? If so, there is no ground for mistake.

If the door is thrown open to such assaults upon conveyances under the idea of a mistake on the part of the clerk, then no confidence is to be placed in the verity of such records, and parol evidence will

in all cases be admitted on the ground that some mistake has been committed by the clerk. It may be that the clerks of the country, in many instances, are derelict in their duty when taking the acknowledgments of *femes covert*, but it is better that a remedy shall be withheld as against the purchaser in such cases than to permit public records evidencing the transmission of title to real estate to be rendered invalid upon parol testimony.

Under the former ruling it almost universally appeared that the *feme* signing the deed fully intended to pass all her title, but was relieved from the effect of her acknowledgment by a mere omission of duty on the part of the clerk, and in such cases it can work no hardship to adjudge that when the *feme* signed the deed and acknowledges it before the proper clerk, and his certificate is in proper form, that no question of mistake can arise as to the manner of acknowledgment. Such, in our opinion, is a proper construction of the statute, and to rule otherwise would be to permit the validity of the clerk's certificate to be questioned in all cases by parol evidence on the allegation of a mistake on the part of the officer.

With this view of the case before us, neither the original answer of the appellants nor the amendments thereto constituted a defense to the action, and the judgment is therefore affirmed.

L. & N. R. R. Co. v. Moore.

CASE 94—PETITION ORDINARY—MARCH 6.

L. & N. R. R. Co. v. Moore.

APPEAL FROM HARDIN CIRCUIT COURT.

1. **MASTER AND SERVANT—RESPONDEAT SUPERIOR.**—The master is liable for an injury to one servant by the neglect of another, although they may be engaged in the same common employment, provided the negligent one is superior to or in control of the injured one.

A railroad company is liable for an injury to a brakeman caused by the willful or gross neglect of the conductor or engineer in charge of the train.

2. **RAILROADS—FIREMAN ACTING AS ENGINEER.**—Where it is the custom of a railroad company to permit the fireman upon its trains to act as engineer in coupling and switching the trains, he is, when so acting, to all intents and purposes, the engineer of the train, and not the common equal fellow-servant of the brakeman, and the rule of *respondet superior* applies where a brakeman is injured by his negligence.
3. **IT WAS GROSS NEGLIGENCE IN THE CONDUCTOR OF A TRAIN** to permit an inexperienced fireman to be in charge of the engine while a coupling was being made by a brakeman in obedience to his order. The brakeman had no right, before proceeding to obey the order, to demand information as to who was to engineer the train, but he had the right to expect that it would be done by the proper person, or one reasonably competent to do so.
4. **EXCESSIVE VERDICT.**—A verdict for nine thousand dollars was not excessive for the loss of a leg in this case.

WM. LINDSAY FOR APPELLANT.

1. Where a servant who has voluntarily taken a dangerous employment receives an injury in the course of his employment, the burden is upon him to prove that the employer was negligent, and that he was free from contributory neglect. (Pierce on Railways, page 382; Sherman & Redfield on Negligence, section 99; Ill. Cent. R. R. Co. v. Heuck's Adm'r, 72 Ill., 286; Central R. & B. Co. v. Kelly, 58 Ga., 114; Sullivan v. Bridge Co., 9 Bush, 88.) Applying this rule, the defendant was entitled to the peremptory instruction asked; but if not, was entitled to judgment upon the findings.
2. The motion for a new trial should have been sustained, because the interrogatories were misleading in form, and not confined to the

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94 17983 675
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L. & N. R. R. Co. v. Moore.

prominent facts upon which the law of the case was to be determined. (Adams' Adm'r v. L. & N. R. R. Co., 6 Ky. Law Rep., 686.)

3. The plaintiff can not recover on account of the negligence of the fireman or brakeman, the three being in the same line of service. While the common law doctrine of *respondeat superior* has been modified to some extent in this State, it still applies where the evidence fails to show willfulness, or that the injury resulted from negligence of a character so extraordinary that it could not reasonably have been anticipated or guarded against. (L. C. & L. R. R. Co. v. Cavens' Adm'r, 9 Bush, 565; L. & N. R. R. Co. v. Collins, 2 Duv., 117; Doyle v. Iron & Steel Works, MS. Op., May 24, 1883; L. & N. R. R. Co. v. Robinson, 2 Duv., 118; L. & N. R. R. Co. v. Brooks' Adm'r, 6 Ky. Law Rep.)
4. The finding as to negligence on the part of the conductor and engineer should have been set aside as against the evidence.
5. It was error to render judgment for the amount awarded as "exemplary damages," as the court failed to explain to the jury the meaning of that term.

WM. WILSON ON SAME SIDE.

1. Appellee was not entitled to recover on account of the negligence of the fireman, both being in the same line of service, and not superior or subordinate the one to the other. (L. & N. R. R. Co. v. Robinson, 4 Bush, 507; L. & N. R. R. Co. v. Collins, 2 Duv., 116.)
2. The general special findings of willful and gross neglect must be controlled by the findings of particular facts, showing that there was no negligence. (Atchison, Topeka & S. F. R. R. Co. v. Plunkett's Adm'r, 25 Kansas; S. C. Am. & Eng. R. R. Cases, vol. 2, page 127.)
3. The appellee's evidence showed that he was guilty of contributory neglect, and, therefore, appellant was entitled to the peremptory instruction asked.
4. The court erred in its definition to the jury of gross neglect. (L. & N. R. R. Co. v. McCoy, 5 Ky. Law Rep.; L. & N. R. R. Co. v. Collins, 2 Duv., 116; L. & N. R. R. Co. v. Robinson, 4 Bush, 507.)
5. The court should have defined contributory neglect. (Sullivan v. Bridge Co., 9 Bush, 90.)

W. P. THORNE AND J. BARBOUR FOR APPELLEE.

1. To enable the defendant to rely upon the contributory negligence of the plaintiff as a defense, it must show that its employees could not by proper care have avoided the consequences of plaintiff's negligence. (Ky. Central R. R. Co. v. Thomas, 79 Ky., 160; 85 N. C., 512.)

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2. Negligence defined. (Cooley on Torts, 630.)
3. Willful neglect was properly defined by the court in its instructions to the jury. (L. & N. R. R. Co. v. McCoy, 81 Ky., 403.)
4. The acts of the conductor, engineer and fireman amounted to willful neglect. (L. C. & L. R. R. Co. v. Cavens, 9 Bush, 559; L. & N. R. R. Co. v. McCoy, 81 Ky., 403.)
5. The conductor, engineer and fireman were each superior to the brakeman, and the latter is, therefore, entitled to recover for an injury resulting from the *gross* or *willful* neglect of any one of them. (L. C. & L. R. R. Co. v. Cavens, 9 Bush, 565; L. & N. R. R. Co. v. Collins, 2 Duv., 114; L. & N. R. R. Co. v. Robinson, 4 Bush, 509; L. & N. R. R. Co. v. Filbern, 6 Bush, 576.)
6. When willful neglect upon the part of the defendant is established, the contributory neglect of the plaintiff can not be relied on as a defense. (Claxton v. E. L. & B. S. R. R. Co., 13 Bush, 636.)
7. The damages awarded are not excessive, as appears from comparison with other verdicts. (Rockwell v. Third Avenue R. R. Co., 63 Barb.; Walker v. Erie Railway Co., 63 Barb., 260; Caldwell v. N. J. Steamboat Co., 56 Barb., 426; Collins v. S. & A. R. R. Co., 28 Ward, 425; Shaw v. Boston, &c., R. R. Co., 5 Gray, 45; Choppin v. N. O. & C. R. R. Co., 17 La.; L. & N. R. R. Co. v. Brooks' Adm'r, 5 Ky. Law Rep.; M. & L. R. R. Co. v. Herrick, 13 Bush.; L. & N. R. R. Co. v. Fox, 11 Bush, 510; Foush v. Riple, 11 Gratt., 703; Pa. R. R. Co. v. Allen, 53 Pa., 276; P. & O. Canal v. Graham, 63 Pa.)

MONTGOMERY & POSTEN ON SAME SIDE.

1. One of several employees in the same line of service may recover from the common employer for an injury resulting from the *gross* negligence of one of his co-employees. (L. & N. R. R. Co. v. Collins, 2 Duv., 114; L. C. & L. R. R. Co. v. Cavens, 9 Bush, 560; L. & N. R. R. Co. v. Robinson, 4 Bush, 509; Filbern v. L. & N. R. R. Co., 6 Bush, 576; Chicago, Mid. & St. P. R. R. Co. v. Ross, Cent. Law Journal, volume 20, page 27.)
2. The jury have found that there was no contributory negligence; but it is immaterial whether there was or not, as the jury has found that defendant might, by the exercise of ordinary care, have prevented the injury, notwithstanding the negligence, if any, of plaintiff.
3. The interrogatories propounded, as well as the general instructions given, were proper. (L. & N. R. R. Co. v. McCoy, 5 Ky. Law Rep., 407.)

JUDGE HOLT DELIVERED THE OPINION OF THE COURT.

The appellee, J. M. Moore, while in the employ of the appellant, the Louisville and Nashville Railroad

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Company, and when engaged upon a local freight train, was, while attempting to make a coupling, caught between the cars, and one of his feet and legs so injured as to necessitate its amputation.

The train consisted of the locomotive and tender, and either twenty-two or twenty-three freight cars. The crew, of a conductor, engineer, fireman, and three brakemen; and of the latter the appellee was the head one. The train had been side-tracked, and then cut in two at the crossing of a road, to enable travelers to pass. The "live portion" of it consisted of the locomotive and three cars; the "dead portion" of probably nineteen cars, and the space between the two portions was about fifty or sixty feet. A short distance down the side-track, beyond where the train had been thus halted, was a barrel of flour to be taken on board; and to save backing down after it the other two brakemen went after it. The testimony tends to show that they had only brought it a part of the way, and that one of them had returned, and gotten upon a car of the dead portion of the train when the accident occurred. After the train had been thus side-tracked for an hour, the conductor started toward the telegraph office, which was near by, and where the engineer already was; and as he did so, he ordered the appellee, Moore, to couple the train. The latter, in obedience to this order, went to the end of the dead portion of the train nearest to the live portion, and the latter backed against the former with great and unusual force, the fireman alone being upon the engine and operating it. The evidence shows that he

was but a boy—at least only twenty years old, and inexperienced. So far as the record discloses, he had never before worked an engine. When the live part of the train struck the dead portion of it, it ran back about one hundred yards, either from the force of the two coming together, or else because the fireman, without waiting to see if the coupling had been properly and safely made, kept on backing the train. He testifies that he continued to back the train because one of the brakeman, but not the appellee, signaled him to do so; and if so, it is probable that it was the one who had returned from the trip for the flour.

It is evident, however, that the two portions of the train came together with great force. The appellee had gone between them to make the coupling; to save himself he caught hold of the step-ladder upon the side of the box-car next to him, and which was a part of the dead portion of the train; but the wheel of the other car caught his foot, and it was cut off as he was dragged back with the train, and his leg ground and broken off piece by piece, and wrenched from the knee socket, and portions of the bone left along the track.

He brought this action, not by virtue of any statute, but under the general law, to recover damages upon the ground that the injury resulted from the willful and gross neglect of the company's employees in charge of the train. A special verdict was rendered, by which the jury fixed the entire damages at nine thousand dollars, of which eight thousand dollars were given as compensatory and one thousand dollars as exemplary.

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The motion of the appellant for a peremptory instruction was properly overruled. The appellee was ordered by the superior officer of the train to make the coupling. It was the duty of the latter, after giving this command, to see and know that the engineer was at his post, or that at least a person competent to operate the train properly was in control of the engine. The appellee had no right, before proceeding to obey the order, to demand information of the conductor as to who was to engineer the train. He had the right to expect that it would be done by the proper person, or one reasonably competent to do so.

Moreover, it appears that immediately after the conductor gave the order he found the engineer in the telegraph office; and yet he did not countermand the direction he had given to the appellee.

It is urged, however, that the injury happened without the knowledge or intervention of the conductor or the engineer; that the appellee saw before he attempted to make the coupling that the fireman was controlling the engine, and that the train was moving rapidly; that the accident resulted, therefore, from the joint neglect of the appellee, the fireman, and another brakeman; and as the two latter had no control over the appellee, but were fellow-servants in a common employment, that therefore the peremptory instruction should have been given. We have already seen that this statement is incorrect as to the conductor; but if it was the custom of the appellant, as appears from the testimony, to permit the fireman upon its freight trains to act as

engineer in coupling and switching the trains, then if the fireman was so acting in this instance he was to all intent and purpose the engineer of the train, and not the common equal fellow-servant of the appellee; and the rule of *respondeat superior* applies.

It was gross neglect upon the part of the conductor to permit this inexperienced boy to operate the train. He ordered the appellee to make the coupling, and before it was attempted he knew that the engineer was not upon the train, and that no one was there to move it save the fireman, and yet he allowed it to be done.

Numerous interrogatories were propounded to the jury; eight by the appellee; eighteen by the appellant, and ten by the court, or thirty-six in all; and the jury found specially that the appellee was injured through the gross and willful neglect of the employees of the company, and that the conductor and engineer were so guilty; fixed the amount of the damages; also that the appellee was not guilty of any contributory neglect; that notwithstanding his conduct the employees of the appellant could, by the exercise of ordinary care, have prevented the injury; that the fireman was not competent to manage the engine, and that it was his duty, before he backed the train to see that the appellee had made the coupling safely; that the appellee had been in the appellant's employ about two weeks, had been acting as a brakeman for four or five years, and was an experienced one; that when he undertook to make the coupling he did not let the pin fall and stoop to pick it up and thus get caught; that the

fireman was not accustomed to, but was permitted to operate the engine, and was not ordered by the conductor or the engineer to take charge of it when the appellee was hurt, and that the latter saw no one upon it but the fireman when he undertook to make the coupling; that the fireman was guilty of willful neglect in operating the train when the appellee was injured, and that it was the custom of the fireman upon the appellant's road, in the absence of the engineer, to operate the engine in coupling and switching freight trains; that the conductor did not know, when he ordered the train to be coupled, that the engineer was not upon the engine, and no one but the fireman; that both he and the engineer, when the train was put in motion, were in the telegraph office, one hundred and twenty-five yards distant from the engine, getting necessary orders, but knew it was done by hearing the jar; that the order to the appellee by the conductor to couple the train was a positive one; that the appellee did not signal the fireman to move the train, but that the other brakeman did; that when the appellee attempted to make the coupling the live portion of the train was moving rapidly, but he did not see it in time to save himself; that he had never before known this fireman to act as engineer; that the latter did not back the live portion of the train in a careful manner, or give the appellee time to make the coupling, but believed, when he continued to back it, that it had been made safely, and did so by reason of the signal from the other brakeman.

It is contended that the general findings, such as

the existence or non-existence of negligence, must be controlled by the finding of specific facts; and that as the jury found that the fireman was not directed by the conductor to move the train, and the appellee knew that he was doing so, that therefore it appears by the facts found that the conductor was not guilty of gross neglect, while the appellee knowingly brought about his injury; and that, therefore, the lower court should have rendered a judgment upon the findings for the company. The same reasons, however, which are mentioned above, for not giving a peremptory instruction, forbade such a judgment.

When one enters upon an employment for another he assumes all the ordinary risks attendant upon it; and where a number of persons enter a common employment for another, all being upon a common footing and none superior or subordinate to the other, and one receives an injury by the neglect of another in the discharge of the undertaken duty, they are regarded as the agents of each other, and no recovery can be had against the employer.

It was once the English rule that it did not matter if the injured servant was subordinate to the neglectful one and under his control; or if they were engaged in different grades and departments of the service. To hold the master responsible he must have had some personal connection with the injury, provided, of course, that he was not neglectful in the selection and retention of his servants.

This rule in that country seems yet to prevail, as well as in many courts of this country, save that if the injured party be in a different grade of the

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service from the neglectful one, then the employer may be made responsible. The establishment of this rule in many of our States is largely due to the influence of the opinion of Chief Justice Shaw in the case of *Farwell v. Railroad Co.*, 4 Met., 49. The courts of Ohio and this State have, however, extended this rule; and the leaning in New York is in the same direction, and they hold not only that the master is liable for an injury to one servant by the neglect of another, if they are engaged in different grades of the employment, but that he is also liable, although they may be engaged in the same common employment, provided the neglectful one is superior to or in control of the injured one. (*Railroad Co. v. Stevens*, 20 Ohio, 415; *Same v. Keary*, 3 Ohio St., 201; *Malone v. Hathaway*, 64 N. Y., 5; *Railroad Co. v. Collins*, 2 Duvall, 114; *Same v. Cavens' Adm'r*, 9 Bush, 559.)

The rule as thus laid down is to our mind the proper one, and consistent with public policy. The Supreme Court of the United States in the case of the *C. & M. Railroad v. Ross*, 112 U. S., 377, after ably reviewing both the English and American cases, has adopted the Ohio and Kentucky rule as the correct one.

Here the conductor had the entire control of the train, and subject to him, to a certain extent, the engineer had control of the brakemen.

These two superior officers were the personal representatives of the corporation as to the appellee; and for the gross neglect of either the corporation is responsible. In no proper sense of the term were

they fellow-servants of the appellee. The brakemen were fellow-servants under the control of these two officers, who represented the corporation. Their acts were its acts, and their neglect or that of the fireman, if he was permitted to act as engineer, was the neglect of the company. It was constructively present in them.

Applying the rule thus sanctioned by the Supreme Court, the appellant is responsible for the appellee's injury. All necessary questions, indeed, more than were necessary, were asked of the jury, either to develop the facts fixing or excusing negligence. It is urged that some of the answers are unmeaning, and can not be understood, especially to the fourth interrogatory propounded by the court, and which included several distinct questions. It is, however, evident that the answer was to the first one, and it being answered in the negative, no answer was necessary to the others, as they were altogether based upon the idea of an affirmative answer to the first one.

The three general instructions defining the different degrees of negligence were correct beyond question, unless it be the second one, and it was, if anything, more favorable to the appellant than it had a right to expect.

It is urged that no instruction was given defining contributory neglect. None, however, was asked by the appellant. Moreover, the jury found, that notwithstanding the acts of the appellee, yet the injury could have been avoided by the exercise of reasonable care upon the part of the appellant's other

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employees. The verdict, in the light of others which have been sustained by the courts of the country, and upon the facts of the case, can not be regarded as excessive. The appellee is shown to have been an excellent brakeman, and in the prime of young manhood; dependent upon his labor for his living; uneducated and unfitted for any employment, save one of manual labor. He is now disabled for life, and unfitted for the calling in which he had educated himself, and which he appears to have adopted. This has resulted, as the jury have said, and as we think correctly, from the gross and willful neglect of those whom the appellant had placed in charge of him in the discharge of what is at best an exceedingly dangerous duty.

Judgment affirmed.

CASE 95—INDICTMENT—MARCH 11.

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APPEAL FROM JEFFERSON CIRCUIT COURT.

1. **REGISTRATION LAW CONSTITUTIONAL.**—The Legislature has the power to enact a law requiring qualified voters to be registered before the day of election as a condition of the exercise of their right of suffrage, and such a law may be local in its application.
2. **IT IS NOT ESSENTIAL TO THE VALIDITY OF A REGISTRATION LAW** that it should contain a provision for an examination on the day of election of the qualification of voters, who from sickness or other cause have been prevented from registering, and, therefore, if the law contains such a provision, it is no objection to it that it may be impossible for the person claiming the right to vote to furnish on the day of election the required evidence of his qualifications.

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3. **PERSONS ENTITLED TO VOTE.**—A residence of one year in a county next preceding the election by a male citizen of the age of twenty-one years gives him a right under the Constitution to vote in any precinct of the county of which he may have been a resident for sixty days next preceding the election, and a registration law is not valid if it requires other qualifications to entitle a person to register.

The statute considered in this case provides that "every person shall be entitled to be registered who would be entitled to vote at the next succeeding August election; that is to say, every male citizen who on that day shall have attained the age of twenty-one years, and shall have resided in the State two years, or in the city one year, and in the precinct in which he offers to register sixty days." *Held*—That the latter or explanatory clause of this section is in conflict with the Constitution, and inconsistent with the first part of the clause; but, as the first part is complete in itself, the latter part may be severed and stricken out without invalidating the residue of the section.

4. **AN INDICTMENT FOR PERJURY** alleged to have been committed in making a false affidavit under the registration law, as to the residence of a voter, was defective in failing to make it appear whether the place at which the defendant stated the person offering to vote resided was or was not in the limits of the precinct in which it is charged he voted.

A. P. HUMPHREY, W. O. HARRIS AND J. P. HELM FOR APPELLANT.

1. It is competent to the Legislature to provide machinery for the ascertainment of the constitutional qualifications of electors on a day or days anterior to the election day. (Cooley's Const. Limit., page 601; 12 Pick., 491; Page v. Allen, 58 Pa. St., 344; Patterson v. Barlow, 60 Pa. St., 75; Dills v. Kennedy, 49 Wis., 558; Clarke v. Robinson, 88 Ill., 504; Edmunds v. Banbury, 28 Iowa, 271; People v. Kopple, 16 Mich., 344; Daggett v. Hudson, 3 N. E. Reporter, page 538.)
2. Such a law applicable alone to the city of Louisville does not violate the constitutional provision that "elections shall be free and equal." (Patterson v. Barlow, 60 Pa. St.; State v. Butts, 31 Kan.; McMahon v. Savannah, 66 Ga., 217.)
3. No one will be allowed to impeach the constitutionality of a law, or any part of it, unless he is injured thereby. (Marshall v. Donovan, 10 Bush, 691; Cooley's Const. Limit., 164; Commonwealth v. Wright, 79 Ky., 28; Thompson v. Carr, 18 Bush, 218.)
4. A law may be constitutional in part and unconstitutional in part, and wherever the unconstitutional part may be stricken out, and leave the remainder of the statute complete, that only which is

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obnoxious to the Constitution will be declared void, and that which is not obnoxious will be declared valid. (Cooley's Const. Limit., side page, 177.)

KOHNS & BARKER FOR APPELLEE.

1. A registration law to be valid must be *reasonable, uniform and impartial*. (Capen v. Foster, 12 Pick., 485; Page v. Allen, 58 Pa. St., 54; State v. Barlow, 60 Pa. St.)
2. The Legislature has no right to pass a registration law applicable to the city of Louisville alone; such a law violates the provision of our Constitution that "all elections shall be free and equal." (Constitution of Kentucky, article 13, section 7.)
3. The law under consideration in this case is invalid, because it prescribes for voters qualifications different from those prescribed by the Constitution. (Constitution, article 2, section 8.)
4. The general words of the Act prescribing the qualifications of voters are limited by the particular words following. (Dwarris on Statutes, pages 201, 217, 272 and 273; United States v. Irvin, 5 McLean, 178.)
5. The General Assembly can not in any way change the qualification of voters, and if they attempt to do so their action is void. (State v. Canada, 73 N. C., 199; State v. Baker, 38 Wis., 79; Dills v. Kennedy, 49 Wis., 558; Rison v. Farn, 24 Ark., 161; State v. Staten, 6 Cold., 233.)
6. A registration law cannot, under the color of regulating the mode of exercising the elective franchise, subvert or restrain the right itself. (Monroe v. Collings, 17 Ohio St., 685; Dills v. Kennedy, 49 Ark., 555; Davis v. McKenly, 5 Nev., 304.)
7. The statute under consideration as effectually denies to a large class of citizens the right of suffrage as if it had done so in express words. Such restrictions will not be tolerated. (People v. Canada, 73 N. C., 223; Edmonds v. Branbury, 28 Iowa, 267; Webster v. Byrnes, 34 Cal., 273; Byler v. Asher, 47 Ill., 101; Rev. Stats. of New Jersey, 364, section 152; Arkansas Stat., 471, section 2328.)

W. R. KINNEY AND NOCK & JONES ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee was indicted for the crime of perjury, charged to have been committed by him in willfully and corruptly making a false statement on oath administered under an act of the General Assembly, entitled "An act to provide for registration of voters

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in the city of Louisville," approved April 23, 1884. But a demurrer to the indictment having been sustained, the Commonwealth prosecutes this appeal, which requires a decision as to the constitutionality of the act as well as the sufficiency of the indictment under it.

In considering the first question it is necessary to inquire—

1. Whether the General Assembly has the power to enact any law requiring qualified voters to be registered before the day of election, as a condition of the exercise of their right of suffrage. And if so,

2. Whether such law is valid when made local and not general in its operation.

3. Whether the whole or any part of the act in question is invalid.

The right to vote is conferred and the qualifications of voters subject to the modification made by article 15 of the Constitution of the United States, are prescribed by section 8, article 2, of the State Constitution, which is as follows:

"Every free white male citizen of the age of twenty-one years, who has resided in the State two years, or in the county, town or city in which he offers to vote one year next preceding the election, shall be a voter; but such voter shall have been for sixty days next preceding the election a resident of the precinct in which he offers to vote, and he shall vote in said precinct and not elsewhere."

The Constitution requires the General Assembly to divide or cause to be divided into convenient election precincts every county, and also each city or

town that has the number of qualified voters equal to the fixed ratio of representation; it prescribes the day and between what hours of the day all elections by the people shall be held; and requires that in all such elections the votes shall be personally and publicly given *viva voce*, except dumb persons may vote by ballot. But in respect to the officers authorized to hold elections, and to determine the result of elections by the people, and the rules by which they are to be governed in the discharge of such duties; and in respect to the officers by whom, the mode, and the time, whether before or on the day of election, those entitled to vote shall be ascertained and separated from those not so entitled, the Constitution is silent.

It is thus apparent that the actual exercise of the right to vote by those possessing the constitutional qualifications is made to depend upon needful rules and regulations which the General Assembly may, from time to time, provide by law, and which section 4, article 8 of the Constitution makes its duty to provide. That section is as follows:

“Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, or other crimes or high misdemeanors. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices.”

Free suffrage must, however, be understood as a privilege restricted to persons possessing the qualifi-

cations prescribed by section 8, article 2, modified in the manner mentioned, and who have not, for the causes stated in the section just quoted, forfeited it. Consequently, to permit persons not having such qualifications to vote at elections by the people, thereby neutralizing or counteracting the influence of those who have, would not only corrupt but impair the value, and tend to entirely defeat the purpose of the elective franchise.

It thus becomes just as necessary that illegal voting be prevented as that legally qualified voters be protected in the enjoyment of the privilege; but to secure free and fair elections, it is indispensable that an examination of the qualifications of each person claiming the privilege of voting should be made by a competent tribunal at some time before his vote is polled, which clearly the Legislature has the power to fix; for the injunction that, for the support of free suffrage, laws shall be passed regulating elections and prohibiting all undue influence thereon, implies legislative discretion as to the time when and the manner in which the examination shall be made, and the right of each person to vote determined; and it is only when such laws add to the qualifications prescribed by the Constitution, or impose unreasonable conditions of the exercise of the privilege of voting, that courts can interfere.

It is true that, until the passage of the act in question, there never was in this State any law, general or local in its application, requiring an examination at any other time or place or by any other

officers than on the day of election, at the place of voting, and by those conducting the election; but the non-exercise of the power proves nothing more than that the exigency requiring a registration of qualified voters before the day of election has not, in the opinion of the Legislature, heretofore existed.

• As said by Cooley in his work on Constitutional Limitations, 602: "The provisions for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised. Such regulations must always have been within the power of the Legislature unless forbidden." And he cites in support of his position numerous authorities, including the leading case of *Capen v. Foster*, 12 Pick., 485, decided as early as 1832. On the other hand, we have been referred to no case where such law is now held to be invalid.

2. If, as we think is beyond question, the Legislature may, without infringing the constitutional privilege of suffrage, enact a general registration law, the only way to avoid the conclusion that it may also, in its discretion, enact such law, local in its operation, is to make it appear that some provision of the Constitution or some right of the qualified voter would be violated in the latter case and not in the former; for the end sought in each case is the support of the privilege of free suffrage, which involves the rigid and certain exclusion of those not entitled to vote, as well as the protection of those in the exercise of the privilege who are; and it is not simply a question of power, but is made the duty of the Legislature to adopt such regulations,

whether general or local, as may be necessary to attain that end in each and every part of the State.

It is, however, contended by counsel, that a local registration law, like the one under consideration, which prescribes rules to govern the exercise of the right of suffrage different from those established in other portions of the State, violates section 7, article 13, which provides "that all elections shall be free and equal."

What are free and equal elections in the meaning of the Constitution?

They certainly are not such as may be secured by the indiscriminate exercise of the right of suffrage, without regard to qualifications or regulations necessary to test and determine the right of those who offer to vote. Nor can elections be considered free and equal when in a portion of the State they may be conducted under the general law comparatively free from the influence of force and fraud, while in another portion, for the want of more suitable and effective regulations than are provided by the general laws, the timid and weak are deterred by violence or tumult from attempting to vote; and illegal votes, added to those influenced by bribery, constitute a balance of power, and often a majority of the whole number given.

Elections are free and equal only when all who possess the requisite qualifications are afforded a reasonable opportunity to vote without being molested or intimidated, and when the polls are in each county and in each precinct alike freed from the interference or contamination of fraudulent voters.

In the country and small towns, where comparatively few persons offer to vote who are strangers to officers of elections, or who can not be readily identified, the necessary examination and test of qualifications may be made on the day of election at the voting places without much hinderance or risk of imposition. But in large cities, where there are greater temptations and facilities for illegal voting, always producing confusion and disorder, it is often impossible for officers of elections, without previous registration of qualified voters, to either prevent fraud or afford to those entitled the opportunity to safely, quietly, and promptly cast their votes. And from necessity other and more effectual regulations than are provided by the general law, or than are required elsewhere, or a majority of the people of the State would probably be willing to adopt, must be provided for such places in order to secure therein free and equal elections in the meaning of the Constitution as we understand it. Such regulations would not, as erroneously argued by counsel, be in any sense qualifications additional to those prescribed by the Constitution, or different from those required of voters elsewhere in the State, but simply the means by which more certainly and effectually to support free suffrage; and as such they are authorized, and wherever necessary, required by the Constitution.

In our opinion we are not authorized to hold a registration law invalid upon the sole ground that it is local in its application; and this view seems to be in accordance with the current of authority in this country.

The act in question provides for the appointment of officers of registration for each precinct in the city, who are required to attend at the voting place for three successive days previous to each election, and to register all qualified voters who personally appear before them and apply for registration.

Section 6 of the act is as follows: "Every person shall be entitled to be registered who would be entitled to vote at the next succeeding August election; that is to say, every male citizen who, on that day, shall have attained the age of twenty-one years, and shall have resided in the State two years, *or in the city* one year, and in the precinct in which he offers to register sixty days," etc.

It seems to us that the latter or explanatory part of the section quoted is not only inconsistent with the first part, but in direct conflict with section 8, article 2 of the Constitution. According to the plain language of the Constitution, a residence of one year in Jefferson county next preceding the election by a male citizen of the age of twenty-one years, gives him a right to vote in any precinct of that county of which he may have been a resident for sixty days next preceding the election, and there is nothing in the act which would prevent a person who has resided in the city of Louisville ten months from voting in any precinct in Jefferson county, outside the city, to which he may remove, and in which he may reside the residue of the year next preceding the election.

But as the act stands, a residence in Jefferson county outside the city to within sixty days of one

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year does not avail a person removing to the city, although he may reside in one of the precincts thereof the remainder of the year next before the election. The bare statement of the unequal and unjust effect of such an interpretation of the Constitution is enough to condemn it. But the two parts of the section are not essentially connected in substance; and, as the first part is complete in itself, the latter may, according to an accepted rule of construction, be severed and stricken out without destroying the sense or invalidating the residue of the section quoted.

By section 14 it is provided that the registration books shall be produced at the several precincts in the city when the polls are opened on the day of election, and "at said election no vote shall be received, unless the name of the person offering to vote is on the registry provided in this act, or unless he produce before the officers of election his written affidavit, stating that he was necessarily absent, or that he was ill and unable to attend, or that some named member of his family was so ill as to require his constant attention, such absence or illness covering the period allowed for registration, and stating facts showing him to be a qualified voter of the precinct, and also the facts in reference to his residence required to be entered on the register; and shall also prove, by the written affidavit of a registered voter of the precinct, who is a householder, that he knows such person to be a registered voter, and stating the facts in reference to such person's place of residence required to be entered on the register."

The objection made to the portion of the section quoted is the difficulty in some cases of making the required proof, whereby, as argued, persons may be embarrassed in the exercise of their right, and occasionally debarred entirely. But if, by the failure of a person to appear before the officers of registration at the time appointed by law, it becomes necessary, in order to save his right to vote, that an exception be made in his favor, we do not think he has a right to complain of regulations adopted for the purpose, and which the Legislature deems necessary to shut out fraudulent voting. Moreover, the question is made, which is proper to decide, whether, to make the act valid, it is indispensable that there should be any provision for an examination on the day of election of the qualification of voters.

It would seem that the right of the Legislature to enact a registration law being conceded, and the reasons and importance of it being recognized as vital and urgent, there exists no necessity or propriety for engrafting upon it any provision which opens the door for the very evils it was intended to guard against.

The Constitution provides that each election by the people shall continue but one day, which results in inevitably depriving those who are absent, from any cause, on the day of election, of the right to vote; yet the evils which would result in various ways from a longer continuance than one day are to be avoided, even if thereby some persons are prevented for the time being from voting. By the act under consideration three days are given in which

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every person in the city qualified to vote has a reasonable time in which to have his name put on the list. It might, perhaps, be proper to make provision for the registration at some other time, before the day of election, of those unavoidably absent during the three days; but we do not perceive how the constitutional privilege of a qualified voter is taken from him when he is afforded a reasonable opportunity before the election to register. We, however, do understand how many persons who are ready and desire to vote may be kept from the polls by tumult, violence and fraud on the day of election.

Except in respect to the objectionable part of section 6 referred to, none of the provisions of the act are invalid; those parts of it in relation to the evidence, which may be heard as to qualifications of voters, being similar to provisions in the general law regulating elections that have never been called in question.

But the indictment being for perjury, is defective, for the reason that it does not appear therefrom whether the place at which appellee stated in his affidavit Campbell resided was or was not in the limits of the precinct in which he, Campbell, is charged to have voted, and for that reason the judgment must be affirmed.

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- color of title, and is not a *de facto* officer. *Creighton v. Commonwealth*. 142
2. One who is not a peace officer, either *de jure* or *de facto*, does not, by assuming to exercise the duties of such an officer, acquire any more authority to make an arrest than any other private individual, and one who kills such a person in resisting arrest by him is to be tried as if the deceased had not been acting as an officer. *Idem*. . . . 142
 3. In resisting an arrest attempted to be made by a person without authority, one has the right to use only such force as is necessary to protect himself from the assault, and has no right to take the life of the person attempting to make the arrest, unless it is necessary to save his own life, or his person from great bodily harm. *Idem*. . . . 142
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1. In order to have a transfer of property by an insolvent debtor declared to operate as an assignment for the benefit of creditors, it is necessary not only to file the petition attacking the transfer within six months, but to sue out summons against the transferee and the debtor within that time. *Savings Bank of Louisville's Ass'ee v. McAllister's Adm'r*. 149
2. Although, where the transferee has made an assignment for the benefit of creditors, he is still a necessary party to the action attacking the transfer, it is not necessary that he should be made a party within the six months. If the petition is filed, and summons issued, against his assignee and the debtor within that time, a *lis pendens* is created, and the right to attack the transfer saved. *Idem*. 149
3. To bring within the act of 1856 a transfer by a debtor to his creditor, it must appear that it was made in contemplation of insolvency, and with the design to prefer the transferee over other creditors.

Where an insolvent debtor executes a mortgage to one creditor in a sum sufficient to swallow up his entire estate, the fact that the mortgagee regarded the debtor as amply solvent, and that the debtor himself "expected to pull through," will not authorize the belief that insolvency was not contemplated, and that there was no design to prefer. *Hoffman v. Brungs, &c.*. 400

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4. H. advanced money to B. & Co. with which to purchase tobacco, under an agreement that all the tobacco purchased by them during the year should be shipped to the tobacco warehouse of H. for sale on commission, and to indemnify him. After advances amounting to a large sum had been made, B. & Co., having become insolvent, executed to H. their note for the whole amount, and also a mortgage on all the tobacco in their warehouse to secure its payment. *Held*—That this mortgage was within the act of 1856, and operated as an assignment for the benefit of all the mortgageor's creditors. Had the tobacco been actually delivered to H. as a factor before other equities intervened, the case would be different, provided the money advanced was invested in this tobacco. *Idem*. 401

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1. A voluntary assignment for the benefit of creditors made in another State will pass personal property in this State as against a subsequent attaching creditor resident here, if the assignment be such as would be upheld and enforced if made in this State.

In this case an assignment made in Ohio transferring all the debtor's property without preference or priority is upheld as to personal property in this State as against a subsequent attaching creditor resident here, it appearing that bond has been executed, and that the assignee has qualified. The contents of the bond not appearing, the court assumes that it is such as is usually required of assignees. *Coffin, &c., v. Kelling, &c.* 649

2. As between the attaching creditor and the assignor, the creditor was properly adjudged to pay the costs, it appearing that he knew of the assignment when he obtained the attachment. *Idem*. 649

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2. Where by virtue of an act of the Legislature creating a criminal court all indictments pending in the circuit court for a particular county are transferred to the criminal court, all who have undertaken that a defendant shall appear in the circuit court are bound to take notice of the act creating the criminal court, and of the time prescribed therein for holding the first term of that court in the county where the indictment is pending, and are as fully bound for the defendant's appearance there as they would have been for his appearance in the circuit court at its next term if the criminal court had not been established. *Idem*. 535

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1. In pleading a discharge in bankruptcy, it is not necessary to allege that the court granting the discharge had jurisdiction, or to state the facts conferring jurisdiction, but it is necessary to allege, in substance, that the discharge was duly granted.
- The certificate of discharge need not be set forth in the answer in *hæc verba*, it being sufficient to refer to it, file it and make it part of the answer. *Laidley, &c., v. Cummings*. 606
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1. An agreement by the father with the mother of a bastard to make the child his heir as if born in lawful wedlock does not entitle the child to inherit the father's estate in the absence of a compliance with section 17, chapter 31, General Statutes; nor does the fact that the father gave the child his name, reared him and held him out to the world as his child, confer upon the child the power to inherit his property. *Willoughby, &c., v. Motley*. 297
2. An infant accused by the mother of a bastard child of being the father of the child may admit his liability, and bind himself by a contract to support the child. *Stowers v. Hollis by &c.*. 544
3. Such a contract is not within the statute of frauds, as it might have been fulfilled within a year from the making of it by the death of the child. *Idem*. 544
4. The mother of a bastard is a competent witness to prove a contract made by the father with her for the support of the child, although he be dead when she testifies, she not being a party to the issue or interested in the result. *Idem*. 544

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1. A positive or direct statement in a bill of exceptions that it contains all the evidence, or all the instructions given and refused, is not essential to make the bill complete. When it appears from the bill that instructions were given by the court of its own motion, or for the plaintiff and then for the defendant, or at the instance of the one party or the other, and then instructions by the court, the bill, so far as the instructions are concerned, will be regarded as complete, unless it appears upon the face of the record that other instructions were given or refused. So, if the bill shows that the plaintiff introduced his testimony, and then the defendant introduced his testimony, or examined the following witnesses, the presumption is that the bill contains all the evidence. *Garrott, &c., v. Ratliff* 384
2. Where the instructions are not excepted to, it is immaterial whether or not they are in the bill of exceptions, as the only question to be considered is the sufficiency of the evidence to support the verdict. *Idem.* 384
3. The signing by the judge at the foot of the bill of exceptions is in substance certifying that it contains all the evidence, or that the bill of exceptions is true, whichever it may be proper for him to certify, as provided by section 889 of the Code. *Idem.* 384
4. The truth of what the judge certifies in the bill of exceptions as to his own rulings and exceptions taken during the progress of the trial can not be controverted by affidavits. *Idem.* 384
5. Where the instructions are not incorporated in the original bill of exceptions, but the clerk is directed to "here insert," and does so in making out the transcript, the instructions thus inserted will be considered as if originally embodied in the bill, unless the appellee comes with an affidavit that they are not the instructions directed to be inserted. *Idem.* 384
6. If further time be given to tender a bill of exceptions, and the absence of the judge who presided at the trial prevents it being signed by him within the allotted time, then it should, in all cases, be certified by by-standers, and not by a judge who did not hear the trial. *Hayden, &c., v. Ortkeis' Adm'r* 396
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LIMITATION.

1. The rule that actions transitory in their nature will lie in this State if process be served here on the defendant, although the cause of action arose in another State, applies as well to actions under the statutes of other States as to common law actions, provided this State has a statute similar in character and import to the statute under which the action is brought, whatever may be the rule where this State has no such statute. *Bruce's Adm'r v. Cincinnati R. R. Co.* 174
2. Whenever the statute of another State gives a right of action for the destruction of the life of one person by the negligence of another, such action may be maintained here, unless the court is satisfied the statute was not intended to operate beyond the limits of the State enacting it, our statutes giving a right of action in such cases; and where both statutes expressly authorize the personal representative to maintain the action, and the persons entitled to the amount recovered are the same under both statutes, the personal representative appointed in this State may maintain the action here under the foreign statute, the cause of action having arisen under that statute. *Idem* 174
3. While a right created by contract valid by the laws of the State where it is entered into, or a right accrued by reason of a statute, will ordinarily be enforced by the courts of another jurisdiction, yet where the statute of another State creates a lien on the estate of the husband for the protection and support of the widow after his death, the widow can not, as against the heir, enforce that lien on the real estate of the decedent in this State, as to allow this would be to
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1. The right to a particular remedy is not a vested right, and the remedy may be altered at the will of the Legislature, provided the alteration does not impair the obligation of the contract.

The power existing in courts under the Code of 1854 to vacate or modify their judgments after the expiration of the term at which they were rendered, upon the sole ground that the defendant against whom the erroneous proceedings were had was a married woman, has been taken away by the present Code, which applies as well to judgments rendered while the Code of 1854 was in force as to those rendered since, and is valid in its application thereto. *Bagby v. Champ, &c.* 13.

2. All legislation which discriminates against any particular race or class of persons is in violation of the Constitution of the United States. Therefore, State taxation for purposes of education should be provided for by general laws, applicable to all classes and races alike, all the children of the State being entitled to an equal share of the proceeds of the "Common School Fund," and of all State taxation for purposes of education.

An act, entitled "An act to establish a uniform system of common schools for the colored children of this Commonwealth," approved February 23, 1874, is unconstitutional. *Dawson v. Lee* 50

3. None of the provisions of a statute should be regarded as unconstitutional when they all relate directly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title.

An act, entitled "An act to authorize a vote to be taken on the proposition as to whether or not spirituous liquors shall be sold as a beverage" in a particular county, is not unconstitutional, because it provides the manner in which druggists shall sell, or physicians shall prescribe, such liquors. *Gayle, &c., v. Owen County Court* 61

4. The fact that one or more provisions of an act are unconstitutional does not invalidate so much of the act as is not open to constitutional objection, when, if the objectionable features are stricken out, the law can be enforced or is still a complete law.

Certain provisions of the statute considered in this case, which change the rules of evidence, are of doubtful constitutionality; but

Constitutional Law.

CONSTITUTIONAL LAW—Continued.

- this will not prevent the punishment of offenders under the ordinary rules of evidence. *Idem* 61
5. The Legislature has the right to determine who shall vote upon a "Local Option" law. An act authorizing a vote to be taken on the proposition as to whether or not spirituous liquors shall be sold in a county is not unconstitutional, because it allows districts in which "local option" is already in force to vote on the question, all being directly interested in the result. *Idem* 62
6. The constitutionality of a statute can not be questioned upon the ground that the statute impairs the obligation of contracts, unless the rights of the person raising the question have been invaded by the statute.

Therefore, although the statute which provides for the redemption of property sold by the commissioner under decree is, as between the debtor and his creditor, unconstitutional, in so far as it applies to sales for debts created prior to the enactment of the statute, the purchaser at such a sale can not complain that the statute is unconstitutional, and object to the sale of the equity of redemption upon that ground, as the obligation of no contract was impaired by the statute so far as he is concerned. *Sullivan, &c., v. Berry's Adm'r* . . . 198

7. An act of the Legislature, approved April 22, 1882, provides that money on deposit, the last owner of which has not been heard of for eight years, shall vest in the Commonwealth: *Provided*, That property in the city of Louisville "subject to escheat to the Commonwealth" shall vest in the Board of Trustees of the Public Schools of said city. The act further provides that money thus paid into the Treasury shall be reimbursed to the owner upon proper proceedings; *Provided*, The Board of Trustees of the Public Schools, and not the State, shall be liable for the money paid to the former.

Held—That this act is unconstitutional in so far as it provides that all such deposits shall vest in the Board of Trustees of the Public Schools, as it, in that respect, impairs the obligation of contracts. That act, however, is constitutional in so far as it vests in the Board of Trustees of the Public Schools such deposits as are subject to escheat to the Commonwealth under section 1, article 1, chapter 86, of the General Statutes. *Bank of Louisville v. Board of Trustees of Public Schools* 219

8. An act of the Legislature, entitled "An act to amend the charter of the city of Covington," which prescribes, among other things, conditions upon which deeds may be recorded in the office of the clerk of the county court, and imposes upon that officer a penalty for doing what is made his duty to do by the general law regulating conveyances, is, to that extent, unconstitutional, as these subjects do not relate to municipal government, and are, therefore, not expressed in the title. *Wulfange v. McCollom, Clerk, &c.* 361

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9. A provision in the charter of a city that all actions to recover from the city money improperly collected as taxes shall be brought within six months, while the general law provides a limitation of five years as to actions of that character, is not unconstitutional because it grants a special privilege. Legislation as to municipal corporations in their public character rests upon peculiar grounds, owing to the fact that they are agencies of the government. *City of Covington v. Hoadley, &c.* 444
10. Women are not eligible to offices created by the Constitution of this State, and are, therefore, not eligible to the office of jailer. *Atchison, County Judge, v. Lucas* 451
11. A statute which discriminates against the citizens or manufactures of another State is unconstitutional.
 An act of the Legislature exempting citizens of this State who vend goods which are the product or manufacture of this State from the provisions of the General Statutes requiring all "peddlers" to take out license is void, and the provisions of the General Statutes are still in force. *Rash v. Holloway*, 82 Ky., 674 (omitted from index of vol. 82).
12. Where an amendment to a general license law makes a discrimination against the citizens of other States by exempting, from the provisions of the original law, the citizens of this State, the amendment and not the original law is void. *Idem*, 82 Ky., 674.

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In the matter of a license to keep a hotel or to retail spirituous liquors, the judge of the county court has a large discretionary power; and, while this discretion is judicial, the chancellor will not control its exercise or prohibit the inferior court from acting when the case is within its jurisdiction. *Gayle, &c., v. Owen County Court.* . . . 61

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1. Where a new trial is granted to one who has been convicted of manslaughter under an indictment for murder, he is in the same position as if no trial had been had, and may be again tried for murder. *Commonwealth v. Arnold* 1
2. The Legislature has the right to prescribe the terms upon which one who has been convicted of crime may have a new trial; therefore section 270 of the Criminal Code, which provides that "the granting of a new trial places the parties in the same position as if no trial had been had," is not unconstitutional. *Idem* 1
3. One can not be convicted of the offense of setting up a faro-bank, unless it appears that he was connected with the bank either as proprietor or as employe; a mere spectator rendering "a momentary or occasional assistance" can not be convicted.
It was error in this case to instruct the jury that they should convict if they believed the defendant "was aiding or assisting" the dealer "so as to keep and exhibit said faro-bank." *Vowells v. Commonwealth* 198
4. Receiving stolen property, knowing it to be stolen, is a complete offense distinct from the larceny of the same property, and the circuit court of the county in which the property was received, and not of the county in which the larceny was committed, has jurisdiction of the offense of receiving the property, knowing it to be stolen. *Allison v. Commonwealth* 254

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1. The damages which may be recovered for the breach of a contract are such only as the parties may fairly be *supposed* to have considered, or at least would have considered as flowing from a breach of the contract if they had been informed of all the facts.
Damages which were not the ordinary result of the failure to deliver a telegram can not be supposed to have been contemplated when the company undertook to transmit it, and can not, therefore, be recovered. *Smith v. Western Union Telegraph Co.* 104
2. It was error to instruct the jury that if the defendant was guilty of willful neglect they "*ought*" to award punitive damages. Nor was

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- the error cured by telling them in another instruction that they "could" find any sum as punitive damages not exceeding the amount claimed in the petition. *Kentucky Cent. R. R. Co. v. Gastineau's Adm'r* 119
3. In fixing compensatory damages for loss of life the inquiry should be limited to the power of the deceased to earn money, had he not been killed, and the jury should not be directed to inquire as to the "value" of that power. *Idem* 119
4. In an action under section 8 of chapter 57, General Statutes, for willful neglect, punitive damages may or may not be given, in the discretion of the jury. It was, therefore, error in this case to instruct the jury that they "should" give punitive damages, if they found willful neglect. *L. & N. R. R. Co. v. Brooks' Adm'r*. 129

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Where the deed of a married woman is acknowledged before one authorized to take the acknowledgment, and the officer's certificate is regular and proper on its face, an allegation of mistake upon the part of the officer will not authorize the admission of parol testimony to contradict the legal effect of the certificate by showing that the clerk took the acknowledgment out of the county, or that the husband was present when the deed was acknowledged by the wife, or that the clerk failed to read and explain the contents of the deed to her. The mistake for which the officer's certificate may be called in question is not a mistake as to the form or manner of acknowledgment. *Cox, &c., v. Gill* 669

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If an infant dies without issue, having title to real estate derived from one of his parents, the whole descends to the kindred of that parent, provided such kindred are not more remote than the grandfather, grandmother, uncles and aunts of the infant; and in determining how the estate shall pass, as between the kindred of the parent from whom the title was derived, it is not material how or from whom the parent obtained the title.

In this case the infant's estate having been inherited from his mother, it is held that upon his death without issue it passed to his maternal *grandfather* and not to his maternal *uncles and aunts*, although his mother obtained the estate through her mother and not through her father. *Power v. Dougherty* 187

DEVISE—

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A testator devised his entire estate to his widow, providing that "after my death you can divide all I left between our children according to your judgment, and which is the best toward you and keeps the best the Catholic religion." The widow had one child by a former husband and two children by the testator.

Held—That the widow took only a life estate, with the power to divide the property between her children by the testator as she saw proper; but she had no power to devise any part of the estate to her child by her former husband. *Holsen v. Rockhouse, &c.* 233

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DOWER—

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A divorce bars all claim of the wife to dower, as well in land conveyed by the husband during the existence of the marital relation as in that of which he may die possessed. *McKean v. Brown* 208

EASEMENTS—

See **WATER COURSES**.

Mere non-user of an easement which has been acquired by grant or its equivalent will not defeat the right to the use. To do so, there must be an adverse use by the servient estate for a period sufficient to create a prescriptive right. *Curran v. City of Louisville* . . . 628

ELECTION—

See **HOMESTEAD**, 3.

Elections. Eminent Domain.

ELECTIONS—

See CONSTITUTIONAL LAW, 10.

MANDAMUS, 1, 8.

1. The contesting election board has the power to inquire and determine whether one elected to an office possesses the qualifications prescribed by the Constitution, and from its decision an appeal may be taken to the circuit court, and thence to the Court of Appeals.

In this case, after the candidate holding the certificate of election had offered to qualify in the county court, the contesting board decided that she was ineligible. *Held*—That her remedy was by an appeal, as indicated, to have her constitutional right to the office determined. *Atchison, County Judge, v. Lucas* 452

2. The Legislature has the power to enact a law requiring qualified voters to be registered before the day of election as a condition of the exercise of their right of suffrage, and such a law may be local in its application. *Commonwealth v. McClelland* 686

3. It is not essential to the validity of a registration law that it should contain a provision for an examination on the day of election of the qualification of voters who from sickness or other cause have been prevented from registering, and, therefore, if the law contains such a provision, it is no objection to it that it may be impossible for the person claiming the right to vote to furnish on the day of election the required evidence of his qualifications. *Idem* 686

4. A residence of one year in a county next preceding the election by a male citizen of the age of twenty-one years gives him a right under the Constitution to vote in any precinct of the county of which he may have been a resident for sixty days next preceding the election, and a registration law is not valid if it requires other qualifications to entitle a person to register.

The statute considered in this case provides that "every person shall be entitled to be registered who would be entitled to vote at the next succeeding August election; that is to say, every male citizen who on that day shall have attained the age of twenty-one years, and shall have resided in the State two years, or in the city one year, and in the precinct in which he offers to register sixty days." *Held*—That the latter or explanatory clause of this section is in conflict with the Constitution, and inconsistent with the first part of the clause; but, as the first part is complete in itself, the latter part may be severed and stricken out without invalidating the residue of the section. *Idem*. 687

EMINENT DOMAIN—

1. To show an abandonment of the right acquired by the condemnation of property for a public use, the acts relied on must be of a conclusive character and clearly established by the evidence. *Curran v. City of Louisville* 628.

 Eminent Domain. Evidence.

EMINENT DOMAIN—Continued.

2. In the exercise of the right of eminent domain real estate may be taken for one public use, and thereafter, by legislative consent, be applied to another of a kindred kind without working a reversion to the original proprietor. *Idem* 623

EQUITY OF REDEMPTION—

See CONSTITUTIONAL LAW, 6.

EXECUTIONS, 1.

JUDICIAL SALES, 1.

ESCHEATS—

See CONSTITUTIONAL LAW, 7.

ESTATES TAIL—

As estates tail are forbidden by our law, and estates that would in former times have been deemed estates tail are now held to be estates in fee-simple, a grantor will not be deemed to have intended to create such an estate if any other construction can be adopted without distorting the meaning of the words used. *Brann v. Elzey, &c.* . . 440

EVIDENCE—

See PRESUMPTIONS.

WILLS, 2, 3, 5.

As to transactions with decedent—See **BASTARDS**, 4.

As to parol testimony to vary writing—See **INSURANCE**, 6.

As to rules of railroad company—See **RAILROADS**, 9.

As to communication between husband and wife—See **WILLS**, 6.

1. The general rule is, that a witness who is introduced to prove the handwriting of a person must have personal knowledge of it, either by having seen him write, or by having seen writing admitted by him to be his, or with his knowledge acted upon as his or so adopted into the ordinary business of life as to create a reasonable presumption of its genuineness. The opinion of experts as to the genuineness of the writing in dispute, formed by a comparison with other writings proved or admitted to be genuine, is not admissible unless the writing is so old that living witnesses can not be had, and yet is not old enough to prove itself. *Fee, &c., v. Talyor* 259
2. Several letters having been offered in the county court as forming together the will of the writer, although the propounder put but one of them in issue upon appeal to the circuit court, it was competent for the contestants to show that the propounder had so offered the others, testifying that they were wholly in the handwriting of the decedent, and then to show that the decedent had not written the testamentary parts thereof. *Idem* 260
3. One part of a correspondence being in evidence, the other part should

Evidence. Ferries.

EVIDENCE—Continued.

- have been admitted, the correspondence being of such a connected character that the whole was necessary to properly enlighten the jury. *Idem* 260
4. Upon the trial of appellant for the murder of her husband, as an accessory before the fact, the court did not err in admitting as evidence letters written for the accused, and at her request, to the man charged with the murder of her husband as principal, the letters revealing a guilty love for the man, and, therefore, furnishing a motive for the act. *Stricklin v. Commonwealth*. 566
5. The rule that parol testimony is inadmissible to vary or contradict the terms of a written contract does not apply where the original contract was verbal and entire, and only a *part* of it has been reduced to writing. *Blackerby v. Continental Ins. Co.* 574

EXECUTIONS—

See INJUNCTIONS, 4.

SUBSTITUTION.

Where the equity of redemption in land sold under execution has been levied on and sold, neither the execution defendant nor the purchaser of the equity can redeem after the expiration of a year *from the date of the first sale*. Therefore, where, at the expiration of the year, the equity has been levied on, but has not been sold, a court of equity can not thereafter subject the property because of the inability of the sheriff to sell, the subject of the levy being no longer in existence. *Bethel, &c., v. Smith, &c.* 84

EXECUTORS AND ADMINISTRATORS—

See PERSONAL REPRESENTATIVES.

EXPRESS COMPANIES—

As to taxation—See STATUTES, 9.

FALSE SWEARING—

See INDICTMENT, 1.

FARO-BANK—

See CRIMINAL LAW, 8.

FEES—

See ASSESSORS.

JAILERS.

FERRIES—

In this action by appellants to recover damages for an alleged disturbance of their ferry privilege, which they claim by virtue of a lease from the city of Paducah, the petition is fatally defective in that it does not allege that the city of Paducah ever acquired or had

 Ferries. Fraudulent Conveyances.

FERRIES—Continued.

the exclusive ferry privilege claimed by plaintiffs. The statement that their ferry is an established ferry, and that they are now the owners of the ferry privilege and the right to collect tolls, etc., is but a conclusion of law. *Owens Brothers v. Lockwood* 266

FORMER ACQUITTAL OR CONVICTION—

See **PRACTICE IN CRIMINAL CASES**, 1, 2.

FORMER JEOPARDY—

See **CRIMINAL LAW**, 1, 2.

FRAUD—

See **FRAUDULENT CONVEYANCES**.

Injury to firm business by dishonest practices of partner—See **PARTNERSHIP**, 2.

City ordinances impeached for fraud—See **MUNICIPAL CORPORATIONS**.

FRAUDS, STATUTE OF—

See **BASTARDS**, 3.

FRAUDULENT CONVEYANCES—

See **ASSIGNMENTS BY OPERATION OF LAW**.

MORTGAGES, 2.

TRUSTS, 1.

1. Where an action to set aside a conveyance as fraudulent is commenced more than five years after the time the conveyance was acknowledged and lodged for record, the plaintiff can avoid the plea of limitation only by pleading and showing that the alleged fraud was discovered within five years before the commencement of the action; and where the action is by an assignee, it not appearing when the debt was assigned, it is not sufficient for the plaintiff to allege that he did not discover the fraud within five years before the commencement of the action, since the *assignor* might have done so within that time, and before the assignment of the debt. *Fritschler, &c., v. Koehler, &c.* 78
2. The cause of action is deemed to have accrued at a time when, by the exercise of ordinary diligence, the discovery of the fraud ought to have been made; and the recording of the conveyance is a circumstance which it is proper to consider in determining when the discovery might have been made. *Idem* 78
3. After ten years from the perpetration of the fraud no action can be brought to set aside a conveyance as fraudulent, it matters not when the fraud was discovered. *Idem*. 79
4. A court of equity, by the levy of an attachment on property fraudulently conveyed, acquires jurisdiction to subject the property, as that

 Fraudulent Conveyances. General Statutes.

FRAUDULENT CONVEYANCES—Continued.

- of the grantor, to the plaintiff's debt, without a return of "no property," where the attachment is duly issued upon the ground that the defendant has disposed of his property with the fraudulent intent to cheat, hinder, or delay his creditors. *Little, &c., v. Ragan Brothers, &c.* 321
5. While the plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant upon the ground that he is a non-resident of the State, this fact is not alone sufficient to authorize a judgment setting aside a conveyance of his estate as fraudulent. *Idem* 322
6. Where the parties to a conveyance, which appears on its face to be simply a conveyance without consideration, attempt to give a reason for its execution, which is contradicted by the facts, this fact may authorize the conclusion that the conveyance was actually fraudulent, although without the attempted explanation the conveyance might have been regarded as merely voluntary. *Idem* 322
7. Conveyances by a debtor to his near relations, in rapid succession, are held to be fraudulent under the circumstances of this case. *Martin, &c., v. Kennedy, &c.* 336

GENERAL STATUTES—Provisions cited, construed, etc.:

Chapter 16, article 1, section 6.	20
Chapter 22, section 1	548, 557
Chapter 22, section 20	52
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Chapter 24, section 21	372
Chapter 24, section 38	572
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Chapter 29, article 1, section 10.	192
Chapter 31, section 9	188
Chapter 31, section 17	300
Chapter 32, section 1	140
Chapter 33, article 7, section 4	457
Chapter 33, article 7, sections 8, 11	459
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Chapter 37, section 16	230
Chapter 38, article 12, sections 5, 6	87
Chapter 38, article 12, section 7.	415
Chapter 38, article 13, section 10	620
Chapter 38, article 13, section 12	621
Chapter 39, article 2, section 42.	438
Chapter 39, article 2, section 53.	665
Chapter 44, article 1.	324
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General Statutes. Homestead.

GENERAL STATUTES—Continued.

Chapter 56, section 12	92
Chapter 57, section 3	188
Chapter 63, article 1, section 8	442
Chapter 63, article 1, section 10	419
Chapter 63, article 1, section 19	84
Chapter 63, article 1, section 21	311
Chapter 63, article 1, section 24	418
Chapter 71, article 3, sections 2, 7	81
Chapter 71, article 4, section 19	602
Chapter 81, sections 10, 12	145
Chapter 81, section 17	78, 670
Chapter 92, article 5, section 8	165
Chapter 104, section 1	252
Chapter 109, section 3	284
Chapter 113, section 5	349, 588

GUARDIAN AND WARD—

1. A guardian is liable for loss to the trust estate by the fraud or wrong of another which was made possible by his own gross neglect, although he may never have received the estate. *Boaz's Adm'r v. Milliken, &c.* 684
2. At the time of the appointment of a guardian there was pending a claim of his ward for a pension filed by a former guardian in the proper department at Washington. The newly appointed guardian allowed two years to pass after his appointment before taking any steps to secure this claim for his ward. In the meantime the former guardian had secured the certificate of the county court clerk of his county that he was still the guardian, and thereupon received the pension money his former ward was entitled to, the greater part of it having been received by him within ten months after the appointment of the new guardian.

Held—That the second guardian was guilty of gross neglect in taking no step looking to the collection of the claim, and in not notifying the pension department of his appointment, thus allowing the claim to stand in the name of the former guardian, and exposing it to the hazard of collection by him; and he is, therefore, liable to the ward. Judge Pryor dissenting. *Idem* 684

HEIRS—

See BASTARDS.

DESCENT AND DISTRIBUTION.

PRESUMPTIONS, 2.

HOMESTEAD—

1. While the homestead right may be waived by a conveyance by husband and wife purporting to convey the whole estate, and which contains

Homestead. Indictment.

HOMESTEAD—Continued.

- no limitation, either in the deed itself or in the certificate of the feme's acknowledgment, yet if it appears, either in the deed or the certificate, that the wife only released her dower, it will not be a waiver of the homestead. *Hayden v. Robinson & Co.* 615
2. A defendant entitled to a homestead may by proper proceedings, even after a judicial sale in an action to which he was a party, have it or the proceeds, not exceeding one thousand dollars, set apart to him. *Idem* 616
3. Where a debtor who is occupying two tracts of land as a homestead executes a mortgage upon one of them and occupies as a homestead the other tract of greater value than one thousand dollars, upon which is situated the dwelling-house, he thereby elects to claim as his homestead the tract not mortgaged, and can not afterward claim a homestead in the mortgaged tract upon the ground that the mortgage contains a release by the wife of her dower only. *Idem* . . . 616

HUSBAND AND WIFE—

See DOWER.

1. A married woman's interest in her father's personal estate, while still in the hands of his administrator, was attempted to be appropriated by her husband's creditors. She applied to a court of equity to have it settled upon her. The amount was four or five hundred dollars, and the husband was insolvent. *Held*—That the wife was entitled to the relief sought. *Bethel, &c., v. Smith, &c.* 84
2. A married woman is not entitled to a settlement as against debts contracted by her; it is only where the husband is seeking to get possession of the property, or his creditors are trying to subject it, that such a claim can arise. *Parsons, &c., v. Spencer, &c.* 306

IMPROVEMENTS—

As to rights of purchaser from defaulting sheriff—See SHERIFFS, 2.

INDICTMENT—

1. The provisions of section 184 of the Code, as to the requisites of an indictment for perjury, do not apply to an indictment for false swearing, it being sufficient in such an indictment to charge that the accused willfully and knowingly swore, deposed or gave in evidence that which was false in a matter which was judicially pending, or on a subject on which he could be legally sworn, or on which he was required to be sworn. Nevertheless, proper allegations of the falsity of the testimony of the defendant are as necessary in an indictment for false swearing as in an indictment for perjury, and it is not sufficient to allege in general terms that the statements of the defendant as a witness were false, but the matter alleged to have been sworn to must be negatived by special averment. *Commonwealth v. Still*. 275

 Indictment. Injunctions.

INDICTMENT—Continued.

2. An indictment in which the offense charged is murder is good, although the particular circumstances of the offense, as set forth therein, constitute an accessory before the fact, and not a principal. *Stricklin v. Commonwealth* 566.
3. An indictment for perjury alleged to have been committed in making a false affidavit under the registration law, as to the residence of a voter, was defective in failing to make it appear whether the place at which the defendant stated the person offering to vote resided was or was not in the limits of the precinct in which it is charged he voted. *Commonwealth v. McClelland* 687

INFANTS—

See DESCENT AND DISTRIBUTION.

As to care required of railroads—See RAILROADS, 8.

The contract of an infant in discharge of an obligation imposed upon him by law, either general or statutory, is valid.

An infant accused by the mother of a bastard child of being the father of the child may admit his liability, and bind himself by a contract to support the child. *Stowers v. Hollis by &c.* 544

INJUNCTIONS—

See MUNICIPAL CORPORATIONS, 2.

As to effect of supersedeas—See SUPERSEDEAS.

1. Section 285 of the Code, which provides that "an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered," applies not only to the party against whom the judgment was rendered, but to all parties who seek to stay proceedings on the judgment. *Mallory v. Dauber's Ex'r.* 239
2. The Louisville Chancery Court has no authority to grant an injunction to stay proceedings on a judgment of the Jefferson Court of Common Pleas. *Idem.* 239
3. Although an injunction to stay the sale of land under an execution issued from the Jefferson Court of Common Pleas was improperly granted by the Louisville Chancery Court, yet as the plaintiff in the injunction had an equity against the defendant, and a resort to the Chancellor was necessary, the Chancery Court had the power to give mere nominal damages upon the dissolution of the injunction; but that court having failed to dissolve the injunction, this court will not reverse on the cross-appeal for that error alone, in order that the lower court may determine the damages the defendant is entitled to. *Idem.* 239
4. An injunction bond to the effect that if the injunction is dissolved the plaintiff will have the property levied on, or its value, forthcoming, to satisfy the order of the court, does not release the execution levy.

Injunctions. Insurance.

INJUNCTIONS—Continued.

- A bond to satisfy the execution, in the event the injunction is dissolved, is the bond that discharges the levy, and the remedy, in such a case, is on the bond and not by a sale of the property upon which the levy was made. *Idem* 239
5. Injunctions do not interfere with the rights of third parties who have acquired them in good faith, and who are not parties or privies to the proceedings.
- An injunction restraining a county surveyor from making a certain survey having been granted in a proceeding to which the surveyor alone was made a defendant, the party claiming the right to have the survey made is not bound thereby, and, if there is no other obstacle, he may have a mandamus to compel the surveyor to make the survey. *Roberts v. Davidson* 279

INSTRUCTIONS TO JURIES—

See NEGLIGENCE, 1.

WILLS, 4.

- While it is usual for the defendant, in moving for a peremptory instruction, to do so upon the plaintiff's evidence alone, yet the court may, after all the evidence has been heard on both sides, direct the jury to find for the defendant if *all* of the evidence is in his favor. *Wiley v. L. & N. R. Co.* 612

INSURANCE—

See VERDICTS, 8.

1. Where a policy of fire insurance contains the condition that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured," the policy shall be void, a breach of that condition does not render the policy void, but voidable only, to be treated as void by the insurer at his own exclusive option. *Stevenson v. Phoenix Ins. Co.* 7
2. Such a condition is broken if the insured subsequently takes out insurance on the same property, even though the policy subsequently issued be void. *Idem* 7
3. An insurance company having become insolvent and ceased to do business, the non-payment of a premium by a policy-holder does not work a forfeiture of the policy, although the policy provides that it shall be void if the insured shall fail to pay the premiums as stipulated. *Jones, &c., v. Life Association of America* 75
4. Where a policy of fire insurance describes the house insured as "occupied as a family residence," and by a subsequent clause provides that the policy shall become void if the house "shall be or become vacant or unoccupied," the words "occupied as a family residence" must be regarded as but a representation as to the then use of the house, and the subsequent words as but an undertaking by the insured that the

Insurance. Judgments.

INSURANCE—Continued.

house shall not be without an occupant during the time covered by the policy.

In this case it is held that such a policy did not become void upon the house insured ceasing to be occupied as a family residence, it continuing to be occupied by one person, who had access to the entire building for the purpose of caring for it. *Imperial Fire Ins. Co. v. Kiernan* 468

5. The condition in a policy of insurance that the company shall not be liable for any loss or damage under the policy, if default shall have been made in the payment of any installment of premium due by the terms of any installment note, is valid, although by the terms of the contract the premium notes of the insured remain binding upon him. *Blackerby v. Continental Ins. Co.* 574
6. Where neither the policy of insurance nor the obligation of the insured fixes a place for the payment of the premium, or names the person to whom it must be paid, parol evidence is competent to show the agreement between the insured and the agent who effected the insurance as to the place of payment. *Idem.* 574

INTEREST—

See PERSONAL REPRESENTATIVES, 2.

JAILERS—

Women ineligible to office of.—See CONSTITUTIONAL LAW, 10.

- One who acted as jailer under circumstances which gave her color of title is entitled to the amount allowed her by the circuit court for dieting prisoners as against the person entitled to the office, although she may not be entitled to the fees for committing and releasing prisoners, etc., which amount to an unimportant sum over which this court has no jurisdiction. *Atchison, County Judge, v. Lucas* . . 452

JEOPARDY—

See CRIMINAL LAW, 1, 2.

JUDGMENTS—

See BANKRUPTCY.

CONSTITUTIONAL LAW, 1.

JUDICIAL SALES, 1.

1. As a judgment against a married woman may be valid, in a proceeding to enforce such a judgment it should not be held conclusively to be void, but the defendant should not be estopped from showing that it is void. *Parsons, &c., v. Spencer, &c.* 305
2. A judgment which does not name the plaintiffs individually, but simply designates them as the "heirs" of a certain person, is not void for uncertainty. *Idem.* 305

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Judgments. Landlord and Tenant.

JUDGMENTS—Continued.

3. The allegation that the plaintiffs recovered the judgment sought to be enforced against W. S. and E. S., "his wife," amounts to an allegation that E. S. was a *feme covert* when the judgment was rendered, and that the plaintiffs in this suit are the same persons who were referred to as "heirs" in the judgment. *Idem* 305
4. The judgment of a court of another State declaring the existence of a lien on real estate situated in this State will not be enforced here. *Short v. Galway, &c.* 501
5. Under the statute of Ohio, which provides for an allowance by the probate court to the widow of a decedent for a year's support, and makes it a lien on the real estate of the decedent, an heir who was not a party to the proceeding in which the allowance was made may question the propriety or the amount of the allowance. *Idem* . . 501.

JUDICIAL NOTICE—

Judicial notice is taken by the State courts of the laws of Congress.
Laidley, &c., v. Cummings. 607

JUDICIAL SALES—

As to right to redeem—See CONSTITUTIONAL LAW, 6.

1. A purchaser of land at judicial sale is not prejudiced by the failure to describe the land in an order for the sale of the equity of redemption, even if such an omission be error. *Sullivan, &c., v. Berry's Adm'r.* 199
2. Where there has been a mistake as to the quantity of land sold at a judicial sale, the Chancellor will in a subsequent action afford relief, if the mistake be such that relief would be granted if the sale had been a private one. *Miller, &c., v. Craig* 623.

JURISDICTION—

See CRIMINAL LAW, 4.

INJUNCTION, 1, 2.

VENUE.

JURY TRIALS—

See VERDICTS.

Questions for court and not for jury—See ARREST, 5.

NEGLIGENCE, 1.

LANDLORD AND TENANT—

See ADVERSE POSSESSION.

1. To give a landlord's lien superiority over other liens he must assert it within ninety days from the time the rent *becomes due*, and not wait until ninety days after the end of the rental year, if the rent is, by contract, due before the end of the year. *Gedge v. Shoenberger, &c.* 91.

Landlord and Tenant. Liquor Selling.

LANDLORD AND TENANT—Continued.

2. A tenant's covenant to pay taxes is construed as an agreement to pay them as a part of the rent, so as to give the landlord priority therefor. *Idem* 91

LEX FORI—

See LIMITATION.

LIBEL—

1. In an action for libel, if the words charged were spoken on an occasion which renders them *prima facie* privileged, the burden is on the plaintiff to show express malice. *Stewart v. Hall, &c.* 375
2. Words spoken in a judicial proceeding, whether by a party, by a witness, or by counsel, are *prima facie* privileged. *Idem* 375

LIENS—

See ATTORNEYS.

CONFLICT OF LAWS, 3.

LANDLORD AND TENANT, 1.

LIS PENDENS, 1.

PARTITION.

SHERIFFS, 1, 2, 3.

VENDOR AND VENDEE, 2, 3.

The lien of supply men, provided for by the act of March 20, 1876, is not superior to a vendor's lien. *Northern Bank of Kentucky v. Deckebach, &c.* 154

LIMITATION—

See ADVERSE POSSESSION.

ASSIGNMENTS BY OPERATION OF LAW, 1, 2.

CONSTITUTIONAL LAW, 9.

FRAUDULENT CONVEYANCES, 1, 2, 3.

PLEADING, 4, 5.

When a cause of action, which has arisen in another State between a resident of such State and a resident of this State, is sought to be enforced in the courts of this State, the Kentucky statute of limitations applies. Section 19 of article 4, chapter 71, General Statutes, has no reference to residents of this State, but was enacted only for the relief of those who are not residents, but who, having come within the jurisdiction of our State courts, are sought to be made liable by residents of some other State or country on a cause of action originating in another jurisdiction than that of the State of Kentucky. *Labatt, &c., v. Smith, &c.* 599

LIQUOR SELLING—

See COUNTY COURT, 1.

LOCAL OPTION.

Lis Pendens. Louisville, City of.

LIS PENDENS—

See ASSIGNMENTS BY OPERATION OF LAW, 2.

PARTITION.

A mere action to subject property upon which the plaintiff has no specific lien, there being no equitable grounds that would authorize the Chancellor to subject it, creates no *lis pendens*, and will not defeat a subsequently acquired attachment lien; but where a lien exists as between the plaintiff and defendant, and the plaintiff brings the property into court for the purpose of enforcing his lien, a *lis pendens* is created which will give the plaintiff priority over a subsequent attaching creditor, although, prior to the action, no lien existed as to creditors by reason of the fact that the plaintiff's lien was not recorded. *Northern Bank of Kentucky v. Deckebach, &c.* 154

LOCAL OPTION—

See CONSTITUTIONAL LAW, 3, 4, 5.

As to recording vote—See MANDAMUS, 1.

1. The fact that in voting upon "local option" the voters were not asked the precise question prescribed by the act, under which the vote was being taken, does not invalidate the vote. *Gayle, &c., v. Owen County Court* 62
2. A statute which prohibits the sale of liquor within a certain territory, but provides that physicians may keep and prescribe it as a medicine, when necessary as such, does not confer an "exclusive privilege" within the meaning of the "Bill of Rights," and is not unconstitutional. *Sarrls v. Commonwealth* 327
3. Where such a statute requires the physician to record every prescription of liquor in a book to be kept by him, and provides a penalty for his failure to do so, under an indictment against a physician for unlawfully selling liquor, the only question is, whether he in good faith prescribed the liquor as a medicine, when necessary as such; and, if so, he is not guilty, although he may have failed to record the prescription, that being a separate and distinct offense. *Idem* . 328
4. Where an act of the Legislature prohibits the sale of liquor in a particular locality, it is not essential to the validity of the act that the locality should be defined by the boundary of a city, town, or civil district. *Idem* 328

LOST BONDS—

See NEGOTIABLE INSTRUMENTS, 1, 2.

LOUISVILLE CHANCERY COURT—

See INJUNCTIONS, 2.

LOUISVILLE, CITY OF—

Fines imposed by the Louisville City Court for misdemeanors committed in the city are to be paid into the treasury of the city; not so, how-

Louisville, City of. Master and Servant.

LOUISVILLE, CITY OF—Continued.

ever, as to fines imposed by the Jefferson Circuit Court. *Barbour v. City of Louisville*95

MANDAMUS—

See INJUNCTIONS, 5.

1. Mandamus is the proper remedy to prevent the clerk and judge of the county court from recording the vote upon a "local option" law, if the law is unconstitutional. *Gayle, &c., v. Owen County Court*. 61
2. Mandamus lies to compel the clerk of the county court to record an instrument which it is made by statute his duty to record. *Wulf-tange v. McCollom, Clark, &c.*361
3. An applicant for a writ of mandamus must show a clear legal right to have the duty performed. Therefore, when it appears that one is constitutionally ineligible to an office to which he has been elected, his application for a writ of mandamus requiring the county judge to permit him to qualify, should be refused.
 In this case the applicant for the writ, who held the certificate of election, being ineligible under the Constitution, the writ should have been refused, although there had been no decision of the contesting board adverse to the applicant when she offered to qualify in the county court. *Atchison, County Judge, v. Lucas*.451
4. The execution of a writ of mandamus may be stayed by supersedeas. *Idem*452

MANSLAUGHTER—

See ARREST, 2, 3, 4.

MARRIED WOMEN—

See CONSTITUTIONAL LAW, 1.

DEEDS.

HUSBAND AND WIFE.

JUDGMENTS, 1.

MASTER AND SERVANT—

See RAILROADS, 7, 8, 9, 10, 11, 12.

1. If one engages the servant of another in an obviously dangerous business he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskillfulness of the servant; nor is it necessary, to authorize the recovery, that the servant should have been employed by the defendant *for wages* when the injury was received.

This rule applied where minor was injured while rendering railroad company service as brakeman on train, the court holding that

 Master and Servant. Mortgages.

MASTER AND SERVANT—Continued.

- relation of master and servant existed between father and minor son. *L. & N. R. R. Co. v. Willis*. 57
2. The rule that, where one of two fellow-servants is injured by the negligence of the other, the common employer is not liable therefor, does not apply in cases of willful neglect, if the two servants were not co-equals.
- In this case it is held that the engineer and a brakeman on the same train were not co-equals, and that the railroad company is liable for the death of the latter if caused by the willful neglect of the former. *L. & N. R. R. Co. v. Brooks' Adm'r* 129
3. The master is liable for an injury to one servant by the neglect of another, although they may be engaged in the same common employment, provided the negligent one is superior to or in control of the injured one.
- A railroad company is liable for an injury to a brakeman caused by the willful or gross neglect of the conductor or engineer in charge of the train. *L. & N. R. R. Co. v. Moore* 675

MEASURE OF DAMAGES—

See DAMAGES, 1, 3.

MISTAKE—

See DEEDS.

JUDICIAL SALES, 2.
MORTGAGES, 4.

MORTGAGES—

See PARTITION.

SUBSTITUTION.

1. The executor and devisees of a decedent sold to appellant, a large creditor of the estate, a brewery, which formed a part of the estate, and with the money thus obtained paid off all the debts of the decedent. An absolute conveyance was made to appellant, but it was agreed, at the time, that appellant should sell the property to L., one of the devisees, on a long credit, which appellant did accordingly, and executed to L. its bond for title. Prior to appellant's purchase it had refused to take a mortgage on the property. *Held*—That the transaction between L. and appellant was a sale, and can not be regarded, in connection with the sale to appellant, as a mortgage. *Northern Bank of Ky. v. Deckebach, &c.* 154
2. As the mortgagee now acquires only a lien by his mortgage, a court of equity will not enforce a mortgage executed for the sole purpose of defrauding the mortgageor's creditors, either as against the mortgageor or as against purchasers for value; nor will the court give

Mortgages. Municipal Corporations.

MORTGAGES—Continued.

the mortgagee a personal judgment on the mortgage note, the note being without consideration.

In this case the mortgaged property has passed into the hands of purchasers for value, and the court holds that it is immaterial whether the purchasers had either actual or constructive notice of the mortgage, as, in no event, can the mortgage be enforced, it being fraudulent. *Jones' Adm'r v. Jenkins, &c.* 391

3. While a mortgage on a stock of merchandise may not be enforceable as to goods not in the store at the time of the mortgage, such a mortgage having been enforced by the lower court without defense, this court can not assume that the stock had been replenished, but must assume that the lien existed and was properly enforced. *Hoffman v. Brungs, &c.* 401
4. Where the clerk, in writing out the certificate to a mortgage which has been acknowledged before a deputy, fails to set forth the facts and include the indorsement made on the mortgage by the deputy, the mistake may be corrected. *Ralston v. Moore, &c.* 571
5. The act of May 10, 1884, cures such defective certificates, but that act can not affect a judgment rendered prior to its passage. *Idem.* . . . 571

MUNICIPAL BONDS—

See **NEGOTIABLE INSTRUMENTS**, 1, 2.

MUNICIPAL CORPORATIONS—

As to special privileges—See **CONSTITUTIONAL LAW**, 9.

1. A city ordinance may be impeached for fraud, but the mere fact that an ordinance, general in its application, injures in a peculiar way a particular individual, will not authorize the courts to presume that it was enacted for the purpose of annoying him, and depriving him of his rights, and for that reason to declare it void. *Shinkle v. City of Covington, &c.* 420
2. Numerous warrants having been issued against an individual, charging him with the violation of a city ordinance prescribing a penalty for each twenty-four hours any person shall hold exclusive possession of any of the streets, commons, etc., belonging to the city, he filed his petition, alleging title in himself to the property which he is charged with holding, and asking an injunction restraining the city from prosecuting him. *Held*—That he is entitled to an injunction restraining the prosecutions until the right of property as between him and the city can be determined. The amount of the fine not being sufficient to authorize an appeal, an injunction is the only remedy. *Idem.* 420
3. A writ of prohibition is the remedy provided by appellee's charter for testing the validity of an ordinance; but the ordinance attacked in this case being valid, that writ is not the proper remedy for deter-

Municipal Corporations. Negotiable Instruments.

MUNICIPAL CORPORATIONS—Continued.

ining the right of property as between the citizen and the city.

Idem 421

MURDER—

See ARREST, 2, 3, 4.

INDICTMENT, 2.

NAVIGATION—

A company to which the Legislature has given the right to construct locks and dams upon a navigable stream, and to charge tolls for boats, rafts, etc., passing through the locks, has no right to charge tolls for rafts which do not pass through the locks. During high water, when navigation is unobstructed, such streams are free for all the purposes of navigation. *Green & Barren River Nav. Co. v. Palmer* 646

NEGLIGENCE—

See CONFLICT OF LAWS, 2.

DAMAGES, 2, 3, 4.

MASTER AND SERVANT, 2, 3.

RAILROADS.

1. When all the facts are found by the jury, the questions of negligence and its degrees are questions of law properly reserved by the court under section 817 of the Code, and it is not necessary for the court to instruct the jury as to the degrees of negligence. *Witty v. C., O. & S. W. R. R. Co.* 22
2. Willful neglect is an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury. *Ky. Cent. R. R. Co. v. Gastineau's Adm'r* 119

NEGOTIABLE INSTRUMENTS—

1. Where the maker of negotiable paper pays it after notice of its loss by the owner, he is liable to the owner unless he can show that he paid to a purchaser for value who purchased in good faith before maturity; and he is liable even though the payment was made to a *bona fide* holder and without notice of the loss, if it was made after maturity, as the paper had then lost its negotiable character.

These rules applied in an action to recover of the maker the interest on municipal bonds which had been stolen from the plaintiff, the original owner, some of the coupons having been paid by the defendant when they were overdue, after notice of the loss of the bonds. *Bainbridge v. City of Louisville* 285

2. Ordinarily, where negotiable paper has been lost by the real owner, he may tender a bond of indemnity, which, when approved by the court, will authorize payment to him by the maker; but in this case

Negotiable Instruments. Officers.

NEGOTIABLE INSTRUMENTS—Continued.

the bonds in controversy being thirty-four in number, and not maturing for many years, and the interest coupons falling due semi-annually, to apply this rule would multiply litigation between the maker and the holders, so resort must be had to some other remedy. The parties being already in a court of equity, an amendment to the petition asking for an injunction restraining the maker from paying the bonds or coupons to any claimant until his right as against the plaintiff, the real owner, is determined, with an order requiring the maker to make each claimant a party as the bond or coupon is presented, so that he may litigate with the plaintiff, would be a more effectual mode of securing the rights of all; but the litigation to determine the rights of future claimants should not be at the cost of the maker. *Idem*. 286.

NEGROES—

See CONSTITUTIONAL LAW, 2.

NEW TRIAL—

See CONSTITUTIONAL LAW, 1.

CRIMINAL LAW, 1, 2.

PRACTICE IN COURT OF APPEALS, 18.

On ground of excessive verdict—See VERDICTS, 7, 9.

1. Where grounds have been filed and a motion for a new trial made within three days after verdict, the trial court may, after the expiration of the three days, permit additional grounds to be filed, when, in the opinion of the court, such additional grounds should be considered before the motion is disposed of. *Houston v. Kidwell, &c.* 301
2. A motion for a new trial must be made within three days after the verdict is returned, whether the verdict be general or special, although judgment may not have been entered upon the verdict. *Imperial Fire Ins. Co. v. Kiernan* 469.

OFFICERS—

See ARREST.

ASSESSORS.

CONSTITUTIONAL LAW, 10.

DEEDS.

JAILERS.

MORTGAGES, 4, 5.

SURVEYS.

1. After one has ceased to be clerk he can not lawfully sign his name officially to a certificate on the deed-book, and, therefore, where a clerk's certificate of acknowledgment to the deed of a married

 Officers. Partnership.

OFFICERS—Continued.

woman which has already been recorded, is not signed by him until after he has ceased to be clerk, it affords no evidence that the deed has been acknowledged, and does not make the deed effectual. *Fitzgerald, Trustee, &c., v. Milliken, &c.* 70

2. A *de facto* officer is one who exercises the duties of an office, claiming the right to do so under some commission or appointment.

One who had been a deputy clerk in the county during the first term of the clerk continued to act as such without reappointment, after his principal had entered upon his second term. *Held*—That he was not a *de facto* officer. *Smith, &c., v. Cansler* 367

OVERRULED CASES—

1. *Taylor's Adm'r v. Pennsylvania Co.*, 78 Ky., 348. *Bruce's Adm'r v. Cincinnati R. R. Co.* 174
2. *City of Covington v. People's Building Asso.*, MS. Op. *Greer v. City of Covington* 411
3. *Allen v. Hill's Adm'r. Labatt, &c., v. Smith, &c.* 599

PARENT AND CHILD—

See MASTER AND SERVANT, 1.

PARTIES TO ACTIONS—

See ASSIGNMENTS BY OPERATION OF LAW, 2.

PARTITION—

In an action instituted for that purpose, land was partitioned and deeds made to the several persons entitled to an interest in the land. One of the persons to whom land was allotted mortgaged two distinct parcels of the portion allotted to him, and attachments were levied by his creditors upon other specified portions. Subsequently, upon appeal, the partition made was set aside, and another partition made. In the last partition the lots mortgaged and levied upon were allotted to other parties in interest.

Held—That the mortgagees and attaching creditors must be treated as *pendente lite* purchasers, and all the property of the debtor having passed to his assignee for the benefit of creditors, the liens of the mortgagees and attaching creditors can not be shifted to lots assigned to the debtor in the last partition. *Martin, &c., v. Kennedy, &c.* 335

PARTNERSHIP—

1. Where two or more persons purchase one or more specific lots or parcels of property on joint account, or in the nature of a limited partnership, for the purpose alone of sale and profit, and there is no fraud or concealment as to the manner of purchase, the mere fact that one of the partners or joint owners is intrusted with the possession does not constitute the others *dormant* partners; and, therefore, the

 Partnership. Personal Representatives.

PARTNERSHIP—Continued.

partner in possession can not pledge the property for his individual debt, so as to bind the other partners. The rule of *caveat emptor* applies, and not the general rule applicable to commercial partnerships, that dormant partners can not assert a claim to the partnership property as against the creditors of the ostensible partner. *Cochran & Fulton v. Anderson County National Bank* 36

2. Where injury to the business of a firm results from the dishonest practices of one of the partners, the other members of the firm may have an action against him for damages.

In this action upon a note executed for the purchase price of an interest in a partnership, the defendant is allowed to plead as a counter-claim damages resulting to the business of the firm from the dishonest conduct of the payee of the note, plaintiff's assignor, who continued to be a partner. *Boughner v. Black's Adm'r.* 521

PATENTS—

While a patent with such sweeping lines as to include within it a large boundary of both vacant and already appropriated lands, without identifying or locating the latter, can not be sustained, land embraced in such a patent can not be appropriated as vacant land without further legislation. *Roberts v. Davidson* 279

PEDDLERS—

See CONSTITUTIONAL LAW, 11, 12.

PEREMPTORY INSTRUCTIONS—

See INSTRUCTIONS TO JURIES, 1.

PERJURY—

See INDICTMENT, 1, 3.

PERSONAL REPRESENTATIVES—

See TRUSTS, 2, 6.

1. A personal representative who has overpaid a creditor under a mistake as to the solvency of the estate can not recover the amount so overpaid if the creditor has been prejudiced by his failure to comply with the law governing the administration and settlement of insolvent estates, or by his bad faith or negligence in any respect. Therefore, where sureties for the debt paid have been released by reason of the negligence of the personal representative, he can not recover. *Brooking v. Farmers' Bank of Ky.* 481
2. Notwithstanding the provision of the statute that no interest accruing after the death of a debtor shall be allowed on a claim against his estate, unless the claim be verified and payment demanded of the personal representative within one year after his appointment, interest may be allowed if the personal representative has waived

 Personal Representatives. Pleading.

PERSONAL REPRESENTATIVES—Continued.

demand, provided he is the only person who will be affected by allowing interest.

In this case the request by the executor that appellants should postpone the collection of their demand to enable him to pay without a sale of the decedent's real estate, and the promise and assurance given that their claim should be paid in full, ought to be construed as a waiver of the demand, so as to allow interest, the executor himself being the only other creditor, and the estate not being sufficient to pay both debts. *Croninger, &c., v. Marthen* 662

3. It was the duty of the executor and of the testator's widow, as executrix, to first pay the debts against the estate as directed by the will, and the collection and appropriation of the rents from the testator's real estate, as well as the appropriation of the personalty, for any other purpose was illegal and unauthorized, and settlements made by the executor in the county court in which he was credited by payments made to the widow out of the rents, and for services rendered by him in collecting such rents, were improper. *Idem*. 663
4. Settlements made by a personal representative in the county court, although erroneous, were properly made the basis of a Master Commissioner's report, as they were not attacked by the pleadings in this action by creditors for a settlement of the estate. *Idem* 663

PLEADING—

See BANKRUPTCY, 1.

FERRIES.

JUDGMENTS, 3.

PRACTICE IN CRIMINAL CASES, 1.

SURETIES, 5.

1. In an action to recover dower the plaintiff's allegation that she had been divorced from her husband can not be construed as meaning that she had been divorced from bed and board only. *McKean v. Brown* 208
2. A plea by the defendant that "he has no information sufficient to form a belief" as to whether certain ordinances were ever published "as required by law" is but a statement of his want of information as to the law, and is not good. *Greer v. City of Covington* 410
3. The only limitation upon the discretion of the court in allowing amended pleadings to be filed is that they must be in furtherance of justice, and must not change substantially the claim or defense.
A demurrer to the petition being sustained, the court did not abuse its discretion in allowing an amended petition to be filed, although an answer and reply had been filed. *Idem* 410
4. A provision in a city charter, fixing a period of limitation for actions against the city, to recover taxes paid under mistake, different from

Pleading. Practice in Civil Cases.

PLEADING—Continued.

- that provided by the general law, being a public statute of local application, it was not necessary to plead it as private statutes are required by the Code to be pleaded. *City of Covington v. Hoadley, &c.* 444
5. In this action to recover of appellant money improperly collected as taxes, the averment of the defendant that it did not, within six months before the bringing of the action, receive the payments alleged, with the statement that "it pleads and relies upon the statute of limitations in such cases made and provided," is a sufficient plea of the statute of six months. *City of Covington v. Hoadley, &c.* 444
6. After an issue has been formed upon the general averments of a petition or counter-claim, and a verdict or judgment rendered, it is too late to object that the pleading should have been more specific. *Boughner v. Black's Adm'r* 521

POSSESSION—

See ADVERSE POSSESSION.

POWER OF ATTORNEY—

1. In construing a power of attorney the intention of the parties and not the letter must control, and if the object can be ascertained from the instrument, it must be so construed as to effectuate that object.

A power of attorney authorizing the signing of the maker's name as surety for a sheriff in a bond for the collection of the State revenue, and also "to indemnify any liability" of said sheriff on a former bond "against any loss or damage, by reason of the suretyship thereon," authorized the execution of a new bond *containing a clause of indemnity to the sureties in the old one.* *Commonwealth v. Hawkins, &c.* 246

2. If the line can be drawn between the good execution of a power and the excess, and they are not so interwoven as to be inseparable, then the former is binding upon the principal.

The fact that an agent, authorized to sign his principal's name as a surety in a sheriff's bond for the collection of the State revenue, executed a bond containing a covenant of indemnity to the sureties in a former bond did not render the covenant to the State inoperative, even though the covenant of indemnity was unauthorized. *Idem* 246

PRACTICE IN CIVIL CASES—

See INSTRUCTION TO JURIES.

NEW TRIAL.

PLEADING, 6.

PRACTICE IN COURT OF APPEALS.

As to when action begins—See ACTIONS.

Practice in Court of Appeals and Superior Court.

PRACTICE IN CIVIL CASES—Continued.

While a party enters his appearance if he does any act from which it may be presumed that he acknowledges the jurisdiction of the court, motions based upon an alleged want of jurisdiction can not have that effect. *Barbour v. Newkirk* 529

PRACTICE IN COURT OF APPEALS AND SUPERIOR COURT—

See BILLS OF EXCEPTIONS.

1. Where the successful party has used original transcript under agreement to pay therefor as if copy had been made, cost of copy may be taxed against unsuccessful party. *Parrish, &c., v. Ferguson, &c.* . 18
2. An assignment of errors which states that the court erred in the instructions it gave to the jury, and in refusing those asked by the appellant, is sufficient without specifying the instructions referred to. *Beaven v. Phillips* 88
3. A bill of exceptions can not be regarded as stating the material facts which the evidence conduces to prove where it states merely that "the evidence in the case was conflicting and conduced to show the facts respectively claimed by the parties in the pleadings." *Idem* 88
4. An alleged error in refusing instructions can not be considered in the absence of the testimony. *Idem* 88
5. It is not a ground for reversal upon the appeal of the plaintiff, and in the absence of the testimony, that instructions given are erroneous when considered upon the pleadings, as the appellant may have failed to show that he was entitled to any relief. *Idem* 88
6. An error in overruling a demurrer must be excepted to, to authorize a reversal therefor. *Idem* 88
7. The appellant was not prejudiced by an order overruling his demurrer to an amended rejoinder, no instruction based upon the pleading having been given. *Idem* 88
8. That there was not *sufficient* evidence to sustain the verdict is not a reversible error in a criminal case. The only inquiry as to the evidence that can be made upon appeal is, whether there was any evidence conducing to show guilt. *Vowells v. Commonwealth* . 193
9. Since the repeal of so much of the Code as required errors to be assigned, the failure of the appellant to file a schedule is not a ground for dismissing the appeal when he has filed the entire record in proper time.

Where a *partial transcript* is desired a schedule must be filed with the clerk of the court below within ninety days after the granting of the appeal, and the filing of the schedule is sufficient notice to the appellee. This rule applies as well to appeals involving the settlement of estates as in ordinary cases, the judge being no longer required to direct the parts of the record to be copied. *L. & N. R. Co. v. Brice* 210

Practice in Court of Appeals and Superior Court.

PRACTICE IN COURT OF APPEALS, &c.—Continued.

10. If a cross-appeal is desired the appellee may file his schedule below; either before or after the schedule is filed by the appellant.
Idem 210
11. That "the court erred in perpetuating the injunction" was a sufficient assignment of error in this case. *Redman v. Forman* 215
12. No reversal for failure to give mere nominal damages. *Mallory v. Dauber's Ex'r* 239
13. Where a jury is waived, and the law and facts in an ordinary action are submitted to the court, in the absence of a motion for a new trial the only questions that can be considered are whether the pleadings authorize the judgment, and whether there is any testimony *whatsoever* to support the judgment. *Henderson, &c., v. Dupree, &c.*, 82 Ky, 678. (Omitted from index of volume 82.)

PRACTICE IN CRIMINAL CASES—

1. A plea of former acquittal or conviction need not be traversed by the Commonwealth. *Vowells v. Commonwealth* 193
2. The burden is on the accused pleading former acquittal or conviction to show that he has been acquitted or convicted of the identical offense for which he is being tried. *Idem* 193

PRESUMPTIONS—

1. Our statute, which provides that death shall be presumed after an absence from the State for seven successive years, unless proof be made that the person was alive within that time, was not intended to exclude all presumptive evidence of death where it does not appear that the party left the State.

In this case, the non-appearance of depositors at a bank for twenty years and the non-claimer by them of their deposits, are circumstances sufficient to raise a presumption of death. *Bank of Louisville v. Board of Trustees of Public Schools* 219

2. Whether long-continued absence will raise the presumption of death *without issue*, must depend upon the circumstances of each particular case; but the legal presumption is that a person leaves *heirs*, either near or remote, and where the testimony is merely negative, and relates to mere absence only, it is insufficient to raise the presumption that the person died intestate, and without heirs. *Idem*. 220

PRINCIPAL AND AGENT—

See POWER OF ATTORNEY.

A principal is responsible for the appearance of the agent's powers, and if the act of the agent is within his apparent authority the principal is bound. *Commonwealth v. Hawkins, &c.* 246

PRINCIPAL AND SURETY—

See SURETIES.

Process. Railroads.

PROCESS—

See STATUTES, 8.

1. An officer's return upon a summons is not conclusive before judgment has been rendered, but the defendant may contradict it and show such a defect in the service as will prevent the court from taking jurisdiction.

In this transitory action the defendant had the right to show that the summons was served in another county than that stated by the officer in his return. *Barbour v. Newkirk*. 529

2. The return of a special bailiff upon a summons which shows *how* and *when* it was executed is sufficient. *Idem*. 529

PROHIBITION OF LIQUOR TRAFFIC—

See LOCAL OPTION.

PROHIBITION, WRIT OF—

See COUNTY COURT, 1.

MUNICIPAL CORPORATIONS, 3.

RAILROADS—

See MASTER AND SERVANT.

1. Trespassers upon the yard or track of a railroad company can not recover of the company for injury unless it was wantonly inflicted after the danger was discovered. *Ky. Cent. R. R. Co. v. Gastineau's Adm'r*. 119
2. One who undertakes to assist an employe of a railroad company, at the request of the employe, does not thereby place himself within the protection of the company so that it is bound to anticipate and ascertain if he has placed himself in danger, unless the employe has express authority from the company to make the request, or occupies such a position toward the company and the act to be done, that the authority can be fairly implied. *Idem*. 119
3. One is bound to exercise reasonable care to *anticipate* and prevent injury to a child of such tender years as to have little or no discretion, although the child be a trespasser.

In this case it was a question for the jury whether a boy about fourteen years of age, killed while uncoupling cars, from his age and experience, had discretion sufficient to recognize his danger and guard against it. If he had, being a trespasser, the company was not bound to *anticipate* and provide against peril to him. *Idem*. 119

4. A regulation of a railroad company, whereby passengers who pay their fare upon the train are required to pay a higher rate than those who purchase tickets before entering the cars, is reasonable, and the company will be protected in its enforcement. *Wilsey v. L. & N. R. R. Co.*. 511
5. Where the conductor of a train demands of a passenger a higher rate of fare than he is entitled under the rules of the company to demand,

 Railroads.

RAILROADS—Continued.

- the demand is illegal, and the company is responsible if the conductor ejects the passenger for his refusal to comply. *Idem*. . . 511
6. As a general rule, when a passenger who holds a ticket from one point to another selects his train and enters upon his journey, he has no right to leave the train at a way station, and afterwards enter another, and proceed to his destination without procuring a ticket or paying his fare from the way station. If, however, the company is not prosecuting the journey in a reasonable time and in a reasonable manner, as the passenger has the right to demand that it shall do, then he may leave the train which he selected, and continue his journey upon another under the original contract, and without paying an additional fare. *Idem* 511
7. A conductor on a railroad train can not recover against the company for an injury resulting from his own confessed want of experience and skill. The fact that the company employed him with knowledge of his want of experience will not enable him to recover, although it would preclude the company from recovering against him for an injury to itself resulting from his want of experience. *Alexander v. L. & N. R. R. Co.* 589
8. It is the duty of the conductor of a railroad train, before moving his train, to know that each car is in proper running condition, and if he fails to make an inspection, and is injured by reason of a defect that might have been discovered by the exercise of ordinary diligence, he can not recover.
- In this case the printed rules of the company required each conductor, before moving a train, to inform himself of the condition of the cars composing it. The conductor failed to do so, and was injured by reason of defective brakes. *Held*—That he can not recover. *Idem* 590
9. The fact that the conductor was not furnished with a copy of the printed rules of the company, and was ignorant of their existence, did not constitute a sufficient reason for rejecting them as evidence. It was his duty to acquaint himself with those rules, which he might have done by the use of ordinary diligence. *Idem* 590
10. The violation by a conductor of a rule of the company forbidding a "running switch" does not preclude him from recovering against the company for an injury received in making such a switch, it appearing that this was the only practicable way of putting cars on the particular switch, and that it had been so habitually resorted to as to raise the presumption that the company was aware of and approved it. *Idem* 590
11. Where it is the custom of a railroad company to permit the fireman upon its trains to act as engineer in coupling and switching the trains, he is, when so acting, to all intents and purposes, the engineer
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 Railroads. Remainders.

RAILROADS—Continued.

- of the train, and not the common equal fellow-servant of the brakeman, and the rule of *respondet superior* applies where a brakeman is injured by his negligence. *Louisville and Nash. R. R. Co. v. Moore* 675
12. It was gross negligence in the conductor of a train to permit an inexperienced fireman to be in charge of the engine while a coupling was being made by a brakeman in obedience to his order. The brakeman had no right, before proceeding to obey the order, to demand information as to who was to engineer the train, but he had the right to expect that it would be done by the proper person, or one reasonably competent to do so. *Idem.* 675

RATIFICATION—

See SURETIES, 4.

RECEIVERS—

1. The receiver of a fund, having loaned it to a firm of which he was a member, a repayment by the firm to him will not exonerate the other members of the firm, he having subsequently converted the funds to his own use. He will not be allowed to hold the fund in one hand as a member of the firm, and in the other as receiver of the court. Each member of the firm should be regarded as holding the money in trust, to be discharged by again placing it under the control of the court, that it may be distributed to those entitled to receive it. *Ryan, &c., v. Morrill & Co.* 352
2. In this case the receiver had no authority, express or implied, to loan the money; but if he had been invested with such a general power, it would have been a violation of the trust for him to loan the money to himself or to a firm of which he was a member. *Idem.* 352

RECEIVING STOLEN PROPERTY—

See CRIMINAL LAW, 4.

REGISTRATION LAW—

See ELECTIONS, 3, 4, 5.

REMAINDERS—

See VENDOR AND VENDEE, 3.

1. A conveyance to F., to have and to hold unto said F. "during his life, and at his death to his heirs by blood," creates in F. an estate for life, remainder to his heirs. *Brown v. Ferrell, &c.* 417
2. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested remainder from one that is contingent.

A devise for life, with remainder to the children of the life tenant, creates a vested remainder in the children, whether or not they are born when the will takes effect. The use of the word "children"

Remainders. Sheriffs.

REMAINDERS—Continued.

- makes the persons to take as certain as if the names of the remaindermen had been given. It is otherwise where the word "heirs" is used, unless it can properly be construed to mean children. *Mercantile Bank of New York v. Ballard's Ass'ee* 481
3. The fact that the interest of the remainderman may be divested by his death before the death of the life tenant does not make the remainder a contingent one.
- Devise to A for life, remainder to B, but if B is dead at the termination of the life estate then to C, passes to B a vested estate and a contingent interest to C. *Idem* 481
4. The intervention of trustees does not modify these rules of construction. The same rules apply as when the conveyance is direct. *Idem* 481

REPEAL OF STATUTES—

See STATUTES, 1, 9.

RESCISSION—

See VENDOR AND VENDEE, 1.

RESPONDEAT SUPERIOR—

See MASTER AND SERVANT, 2, 3.

RAILROADS, 11, 12.

REVIVOR—

See BILLS OF EXCEPTIONS, 7.

SCHEDULES—

See PRACTICE IN COURT OF APPEALS AND SUPERIOR COURT, 8, 9.

SHERIFFS—

See POWER OF ATTORNEY.

- Where the sureties of a sheriff claim a lien, by substitution to the rights of the Commonwealth, upon land which the sheriff has conveyed to another, the sheriff's vendee is entitled to share *pro rata* with the sureties in the proceeds of the land, to the extent that the amount paid by him upon the purchase price was paid by the sheriff upon the revenue for which the sureties were bound; but he is not entitled to priority, the lien of the Commonwealth existing when he made the payment. *Dawson v. Lee* 50
- Where one purchases land from a defaulting sheriff, and in good faith makes necessary improvements, without notice that his vendor has defaulted, he is entitled, as against the sheriff's sureties claiming a lien upon the land by substitution to the rights of the Commonwealth, to be reimbursed out of the proceeds of sale to the extent that the improvements are shown to have increased the vendible value of the land. *Idem* 50

 Sheriffs. Statutes.

SHERIFFS—Continued.

3. The Commonwealth is not entitled to money collected by the sheriff, as taxes, under a void statute, and, therefore, has no lien therefor to which the sureties of the sheriff can be substituted. *Idem* . . . 50

SLANDER—

See LIBEL.

SPECIFIC PERFORMANCE—

See VENDOR AND VENDEE, 1.

STATUTE OF FRAUDS—

See FRAUDS, STATUTE OF.

STATUTES—

See CODES OF PRACTICE.

CONFLICT OF LAWS.

CONSTITUTIONAL LAW.

GENERAL STATUTES.

MORTGAGES, 5.

PLEADING, 4.

1. Where the General Statutes treat of any subject under a separate title, they must be regarded as containing all the statute law on the subject, and as repealing any previous statutory provision upon the subject omitted therefrom. *Parrish, &c., v. Ferguson, &c.* . . . 18
2. Where *particular* words of a statute are followed by those of a *general* character, the latter are to be restricted to objects of the same kind as those particularly mentioned.
 "An act to amend the charter of the city of Louisville" provided for the imposition of a fine *by the city court* for any injury done to any of the public ways in the city, and provided further, that "all such fines, as well as the fines for all other misdemeanors committed in the city of Louisville," should, when collected, be paid into the treasury of the city. *Held*—That the general words refer to fines imposed by the *city court* for offenses other than injuries to the public ways, and not to fines imposed by the circuit court. *Barbour v. City of Louisville* 95
3. A law is to be construed in the light of the settled policy of the State with reference to the subject-matter as indicated by previous legislation. *Idem* 95
4. Contemporaneous construction by those procuring an act is to be regarded in construing it. *Idem* 95
5. The spirit of the law and not the letter must control in its construction. *Idem* 95
6. The practical construction given to a statute through a long period, and acquiesced in by all departments of the government, should control the court in construing it, even though that construction

 Statutes. Supersedeas.

STATUTES—Continued.

- may contravene the letter of the law. *Harrison, &c., v. Commonwealth* 162
7. A statute should be construed according to its equity, the object to be accomplished being considered. *Idem* 162
8. The act of March 6, 1878, declaring Diamond Island, in the Ohio river, to be a part of Jefferson county, can only be regarded as declaratory of the county location of the island from the enactment of the statute, and can not, therefore, affect a service of summons made prior to the passage of the act.
- In this case a service of summons at a particular place on Diamond Island prior to the act of March 6, 1878, is held to have been made in Oldham county. *Barbour v. Newkirk* 529
9. One statute will not be regarded as repealing another by implication unless they are absolutely irreconcilable, or there is sufficient reason to conclude the Legislature so intended.
- Foreign* express companies being exempted by statute from local taxation by the payment of the State tax for the privilege of doing business, a provision in the charter of the city of Lexington authorizing it to impose a license tax upon "each" express company can not be held to apply to *foreign* companies. *Adams Express Co. v. City of Lexington* 657

SUBSTITUTION—

See SURETIES, 3.

An execution defendant, at the time the execution was placed in the sheriff's hands, owned real estate, subject to mortgage liens, amounting to \$15,000. Before the execution was levied appellant, a stranger to the execution, purchased the property for \$6,000, paid to the mortgagees. They released their liens for his benefit, but did not assign the mortgage or mortgage notes. The execution was then levied on the property as the absolute property of the defendant.

Held—That appellant is not entitled to be substituted to the liens of the mortgagees, except to the extent of the amount paid by him. *Mallory v. Dauber's Ex'r* 239

SUMMONS—

See PROCESS, 1, 2.

SUPERSEDEAS—

Where, on final hearing, an injunction has been dissolved, the execution of a supersedeas bond by the plaintiff and the service of an order of supersedeas leaves the injunction in full force, and the defendant is guilty of contempt if he disregards it. *Smith, &c., v. Western Union Telegraph Co.* 269

Sureties. Tavern License.

SURETIES—

See POWER OF ATTORNEY.

SHERIFFS, 1, 2, 3.

1. Where the name of a person is signed as surety by an agent, he is not bound thereby unless the agent's authority was in writing signed by him. A writing signed by another for the person to be bound is not a sufficient authority. *Dawson v. Lee*. 50
2. Where one pays a debt for which he supposes himself to be bound as surety, when in fact he was under no legal obligation to pay, he occupies no better attitude than a mere stranger or volunteer, and can not be substituted to the creditor's rights against the principal or the principal's vendee. *Dawson v. Lee*. 50
3. Where property is pledged by a stranger to indemnify a surety, and not with the intention that it shall be applied to the payment of the debt in order to relieve the surety, it can not be subjected by the creditor, nor can the surety subject the property until he has shown that he has sustained loss, or is in such a condition as that loss must be necessarily sustained.

In this case the surety, against whom judgment has been rendered, being insolvent, property mortgaged to him by the daughter of the debtor to save him harmless can not be subjected either by him or by the creditor. *Macklin, &c., v. Northern Bank of Kentucky*. 314

4. Where one's name has been signed to a note as surety without his authority, a subsequent promise to pay the note is not binding. *Garrott, &c., v. Ratliff*. 384
5. Under a plea of *non est factum*, the obligors in a note can not, upon the ground that they were sureties, require the plaintiff to show that their names were signed by their written authority. *Idem*. 384
6. Sureties in a note having been induced to believe, for nearly five years, that the note had been satisfied, and thereby deprived of the opportunity of seeking indemnity, are released. *Brooking v. Farmers' Bank of Kentucky*. 431

SURVEYS—

See INJUNCTIONS, 5.

It is the duty of the surveyor when applied to, to make entries for persons holding warrants from the county court, and to survey entries in the order in which they are made; and he can not be heard to say that one is not entitled to a survey because no entry has been made, when it was his duty to make the entry. *Roberts v. Davidson*. 279

TAVERN LICENSE—

See COUNTY COURT, 1.

Taxation. Trusts.

TAXATION—

See CONSTITUTIONAL LAW, 2.

STATUTES, 9.

1. The Legislature may authorize a city to collect taxes by suit; and where this remedy is given, it will not be held to exclude a summary mode of collection already provided by statute, nor will it be limited to cases in which the summary mode may have proved ineffectual, unless the statute so provides. *Greer v. City of Covington* 410
2. A personal judgment bearing interest from its date may be rendered against the tax-payer, where a suit for the collection of taxes, in addition to the summary mode of collection by distraint, is authorized by statute. *Idem* 410

TELEGRAPHS—

1. Telegraph companies can not, by contract, relieve themselves from liability for their *negligence* in failing to deliver messages. *Smith v. Western Union Telegraph Co.* 104
2. Damages which were not the ordinary result of the failure to deliver a message can not be supposed to have been contemplated when the company undertook to transmit it and can not, therefore, be recovered. *Idem* 104

TOWNS AND CITIES—

See MUNICIPAL CORPORATIONS.

TRUSTS—

See GUARDIAN AND WARD.

1. When a deed is made to one person and the consideration is paid by another no use or trust results in favor of the latter *as between the parties*; but if the property is in fact held in secret trust for the party paying the consideration, his creditors may subject it to the payment of their debts, whether created prior or subsequent to the execution of the deed. *Matthews v. Albritton, &c.* . . . 32
2. Wherever there is a beneficial interest in property, it is liable for the debts of the beneficiary.

A testator devised all his estate to his daughter for life for her separate use, "not to be subject to or liable for debts or liabilities she may have or hereafter contract," directing his executor to make such investments as he should deem advisable, and to pay annually to the testator's daughter the profits of the estate.

Held—That the personal representative is to be regarded as a trustee for the testator's daughter, who is entitled to the income of the entire estate after the payment of the testator's debts, and while he should not be divested of the possession of the property, the court will, although the testator did not so intend, subject the use or

Trusts. Vendor and Vendee.

TRUSTS—Continued.

- income arising from it to the payment of any debt for which the *cestui que trust* is in fact liable, and direct the trustee or administrator to so apply it. *Parsons, &c., v. Spencer, &c.* 306
3. When a trustee, in whom is vested the legal title to land, is barred by limitation, the *cestui que trust* is also barred, although he be an infant. *Barclay, &c., v. Goodloe's Ex'r, &c.* 493
4. Where a trustee, empowered by the will under which he received his appointment to name his successor, appeared in an action instituted by him for the purpose of resigning the trust, and exercised the power thus conferred upon him, no further proof of his acceptance of the trust ought to be required after a great lapse of time. *Idem* 493
5. Where a will conferred upon a trustee under it the power to name his successor, the *cestui que trust* was not a necessary party to an action by the trustee to have a successor appointed. *Idem* 493
6. A court of equity never wants a trustee, and when property has been bequeathed in trust, and the trustee appointed refuses to take, the court will decree the execution of the trust by the personal representative, who is deemed the trustee, if the trust estate is personal property. *Tucker, &c., v. Grundy, &c.* 540
7. A trustee under a will is not discharged from the duties of the trust by the mere tender of his resignation in the county court, having once accepted the trust. *Idem* 540

VENDOR AND VENDEE—See **ADVERSE POSSESSION.**Mistake as to quantity of land sold—See **JUDICIAL SALES, 2.**Particular transaction a sale and not a mortgage—See **MORTGAGE, 1.**

1. Where time is not of the essence of a contract for the sale of land, the inability of the vendor to make a good title at the time of the contract, or at the time agreed upon for performance, will not entitle the vendee to a rescission, the vendor's title being subsequently made perfect; and even though the vendor is not able to comply with his contract when the suit for rescission is instituted, yet if he can perfect his title within a reasonable time the court will give him an opportunity to do so. In this case, however, the property agreed to be conveyed being the property of the vendor's wife, and the improvements having been destroyed by fire before a sufficient deed was tendered, the vendee can not now be required to accept a deed and pay the purchase money, the vendor having ample time before the fire to make the deed, which, by the contract, was to have been made on a certain day, and furnishing no sufficient excuse for not doing so. *Smith, &c., v. Cansler* 367
2. As between vendor and vendee, a lien for purchase money exists,

Vendor and Vendee. Verdicts.

VENDOR AND VENDEE—Continued.

- although it does not appear from the deed that any part of the purchase money remains unpaid. *Brown v. Ferrell, &c.* 417
8. Remaindermen occupy the position of vendees, and hold subject to the vendor's lien, where the deed is to the vendee for life, remainder to his heirs, and both the life tenant and the remaindermen then in existence being parties to the action to enforce the lien, the purchaser at the decretal sale acquires an absolute title, free from any claim of after-born children of the life tenant. *Idem* 417

VENUE—

See CRIMINAL LAW, 4.

INJUNCTIONS, 1, 2.

An action upon a return of no property found, pursuant to section 439 of the Code, may be brought in the county in which the defendant resides. *Parsons, &c., v. Spencer, &c.* 306

VERDICTS—

1. A separate-general verdict was intended to apply in cases where there is more than one issue, and is a finding for the plaintiff or defendant upon a particular issue. *Witty v. C., O. & S. W. R. R. Co.* 21
2. A special verdict is a finding of facts, without reference to their relation to any issue. *Idem* 22
3. If a separate-general verdict is asked, the court *must* grant it, and require the jury to return also a general verdict. *Idem* 22
4. If a special verdict is asked, the court *must* grant it, and *may*, in its discretion, also direct a general verdict, but is not compelled to do so as in the case of a separate-general verdict; if, however, the court does direct a general verdict, it must instruct the jury as to the whole law of the case. *Idem* 22
5. In directing a special verdict the court should confine the questions propounded to the controlling facts in the case, and they should be such as to enable the court, on the return of the verdict, to apply the law and enter judgment without any thing further from the jury; and where either party may be entitled to recover money, or where damages are to be assessed, the court should direct the jury to assess the amount of recovery. *Idem* 22
6. What a person *might* or *would* have done in a certain event is not the proper subject of a special finding, and such a finding, although not objected to, will not be considered. *Smith v. Western Union Tel. Co.* 104
7. In an action to recover damages for the loss of the life of a brakeman on a train caused by the willful neglect of the railroad company, a verdict for \$10,000 is not so excessive as to indicate that the jury was influenced by passion or prejudice. *L. & N. R. R. Co. v. Brooks' Adm'x* 129

Verdicts. Wills.

VERDICTS—Continued.

8. The finding of facts by a jury in answer to questions submitted to them in writing constitutes a special verdict, and to entitle the plaintiff to judgment upon such a verdict, it is not necessary that the jury should declare that if, upon the facts found, the plaintiff is entitled to recover, he is entitled to a certain sum, naming it, or that his damages are so much.

In an action upon a policy of insurance, it was admitted that the parties had, by agreement through arbitrators, fixed the entire loss, but what amount had been awarded was in issue. The jury found the amount of the award, which was greater than the amount of the policy. *Held*—That upon this verdict the court was authorized to render judgment for the amount of the policy, the question as to the amount for which judgment should be rendered being, under the circumstances, merely a legal one, and involving no question of fact. *Imperial Fire Ins. Co. v. Kiernan* 469

9. A verdict for nine thousand dollars was not excessive for the loss of a leg in this case. *Louisville & Nash. R. R. Co. v. Moore*. 675

WARNING ORDER—

Beginning of action—See ACTIONS.

WATER-COURSES—

See NAVIGATION.

- The owner of land has the right to use for his own purposes that which is beneath the soil, whether rock or water, where there is no intent to injure the adjoining owner.

As to running surface water, the owner can appropriate it to his own use, but he can not so divert it as to prevent its use by those below him, and even where the water is running underground, if it flows in a natural channel known and ascertained by those deriving its benefits, it can not be diverted to the injury of the riparian proprietors. *Redman v. Forman* 215

WILLS—

See DEVISE.

EVIDENCE, 2.

1. When the due execution of a paper, rational in its provisions, and consistent in its details, language and structure, has been proved, the propounder has made out a *prima facie* case, and the burden of showing that the testator was not of sound and disposing mind when the writing was executed shifts to the contestant. *Fee, &c., v. Taylor*. 259
2. The requirement of the statute that a will shall be attested by "at least two credible witnesses," means that it shall be attested by such persons as are not disqualified by mental imbecility, interest or

Wills. Women.

WILLS—Continued.

- crime from giving testimony in a court of justice. It was, therefore, error in this case to require the jury to find that the witnesses to the will in contest were credible persons, in order to sustain the will; but as there was no testimony even tending to show that the witnesses to the will were not credible, the instruction was not prejudicial. *Fuller v. Fuller*. 345
3. The refusal of the court to permit the propounder of a will to testify in chief after the contestant had introduced his testimony, and after she had introduced other testimony in her behalf, even if error, does not appear to have been prejudicial, as there was no avowal of what she would state if introduced in chief, and nothing to show that she did not, in fact, testify all she knew. *Idem*. 345
4. An instruction calling attention to the isolated fact that, by the paper in contest the maker had disinherited his son, was properly refused. *Idem*. 345
5. Letters from the testator to his son, the contestant, were competent to show the affectionate relation existing between them, and the purposes of the testator with regard to the disposition of his property. *Idem*. 345
6. Letters from the testator to his wife, the propounder, were not incompetent as evidence for the latter upon the ground that they were "confidential communications." *Idem*. 345
7. An unattested codicil, although wholly in the handwriting of the testator, can not bring into operation as a will a paper which is neither in the handwriting of the testator nor attested as required by the statute. *Sharp, &c., v. Wallace, &c.*. 584

WITNESSES—

See WILLS, 2.

WOMEN—

See CONSTITUTIONAL LAW, 10.

See 9.

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